SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 748

JOHN E. HODGES, PETITIONER,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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A IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Judgment and Commitment—May 3, 1957

On this 3rd day of May, 1957 came the attorney for the government and the defndant appeared in person and by counsel, Messrs. Edward Carey and John Kilcullen.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of ROBBERY as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Four (4) years to Thirteen (13) years.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ JOHN J. SIRICA
United States District Judge.

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Motion for Relief Under Title 28, Section 2255, United States Code—Filed August 20, 1957

B Comes now the defendant, John E. Hodges, by and through his attorneys, Edward F. Daly and Sutherland G. Taylor, and respectfully moves this Court for relief Under Title 28, Section 2255 of the United States Code, as follows:

1. Defendant was convicted of armed robbery on a plea of guilty in this Court and sentenced on August 30, 1956 to a term of three to twelve years.

2. The aforesaid plea of guilty was withdrawn, a plea of not guilty entered, the aforesaid conviction and sentence vacated and set aside by Order of this Court dated February 7, 1957.

3. On April 15, 1957 defendant was convicted and sentenced to a term of four to thirteen years in the custody of the Attorney General.

4. Defendant was arrested on April 29, 1956 by the Chicago Police without a warrant and at the apparent request of the Metropolitan Police Department, Washington, D. C.

5. Defendant was held without a warrant for five days by the said Chicago Police acting with the knowledge and consent of the said Washington Police during which time he was questioned continuously, beaten physically and subjected to psychological as well as physical torture, with the result that he made a statement demanded by the Chicago police but refused to sign it.

6. On May 1, 1956 the Metropolitan Police Department obtained a warrant for defendant's arrest and sent officers to Chicago, Illinois, where they demanded a confession from defendant under threat of handing him back over to the Chicago Police for further mistreatment and abuse. Whereupon, defendant signed an alleged confession, waived extradition and was returned by the said Metropolitan Police officers to the District of Columbia on May 3, 1956.

7. Upon his return to the District of Columbia defendant was placed in a cell at No. 1 Precinct, held over night and finally taken before U.S. Commissioner Cyril Lawrence the following morning, May 4.

C 8. Defendant's alleged confession was admitted in evidence at his trial and used against him over the objection of trial counsel.

9. The rights of the defendant under the Constitution and Laws of the United States were clearly violated by the above described procedure.

Rule 5, Federal Rules of Criminal Procedure
U.S. v. McNabb, 318 US 332

U.S. v. Mallory, 77 S. Ct. 1356
U.S. v. Watkins, U.S. App DC, decided August 19, 1957.

10. The motion, files and records in the case clearly show that defendant is entitled to relief.

WHEREFORE, defendant moves this Honorable Court to vacate and set aside his sentence and discharge him forthwith from custody, or in the alternative to grant a prompt hearing hereon.

DALY AND TAYLOR

By /s/ SUTHERLAND G. TAYLOR,
Attorney for Defendant

• • •

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Opposition to Motion for Relief Under Title 28, Section 2255, United States Code—Filed Sept. 30, 1957

Comes now Oliver Gasch, the United States Attorney in and for the District of Columbia, and in opposition to the present motion respectfully represents unto the Court as follows:

1. The defendant was indicted on June 4, 1956, on a charge of robbery. On August 30, 1956, the defendant entered a plea of guilty. The defendant was sentenced to imprisonment to a term of three to twelve years.

2. The aforesaid plea of guilty was withdrawn, and a plea of not guilty entered, the aforesaid conviction and sentence vacated and set aside by Order of Court on February 7, 1957.

3. On April 15, 1957, defendant went to trial and
D was convicted and sentenced to imprisonment to a term of four to thirteen years.

ARGUMENT

The petitioner contends that he was unlawfully arrested and was not brought before available Commissioner without unnecessary delay.

The Metropolitan Police Department secured an arrest warrant for defendant on April 26, 1956, and sent same to the State of Florida on information that the defendant was in that state. On April 30, 1956, the Metropolitan Police were notified by the Chicago Police Department that the defendant was arrested in Chicago. On April 1, 1956, the Metropolitan Police secured a U.S. Commissioner's warrant for the defendant. On May 2, 1956, the Metropolitan Police arrived in Chicago and saw the defendant about two or two-thirty P.M. They talked to him about one hour and reduced his statement in writing ending at three-thirty-five P.M. on May 2, 1956. The defendant waived extradition. The police were unable to make reservations for the return of the defendant to Washington, D.C. until May 4, 1956. The defendant was notified of this fact and it was agreeable to him. The defendant in custody of police arrived in Washington, about four-fifteen P.M. on May 4, 1956, and on the way to Police Headquarters pointed out where he left the car used in the Robbery. They arrived at Police Headquarters about five P.M. The defendant was charged with Robbery, put in line-up and then placed in No. 1 Precinct, and on the following morning, May 5, 1956, was brought before the United States Commissioner. The defendant was questioned by the Chicago Police while in their custody only about local Chicago robberies. The Metropolitan Police at no time made any threats or promise to the defendant and the confession made by defendant was made voluntary.

The Meaning of Rule 5(a)

Rule 5(a), Federal Rules of Criminal Procedure, provides that an officer making an arrest shall take the arrested person without unnecessary delay before the nearest available Commissioner or officer empowered to commit persons charged with offenses against the United States.

E The provisions of the Rule are not jurisdictional. They have been treated by the Supreme Court of

the United States as being requirements of criminal procedure. See *Mallory* v. *United States*, decided June 24, 1957, — U.S. —, at page 3 of slip decision. It is noted that at that point of the decision there is reference to *McNabb* v. *United States*, 318 U.S. 332, 343-344. The McNabb and Mallory decisions treat Rule 5 as being an expression of Federal Statutory policy. At no place in those decisions is there to be found reference to the rules of those cases as being anything approaching constitutional rights or matters relating to the jurisdiction of the Court.

It is well established rule of law that sufficiency of proof, errors of law or of fact on the trial cannot be raised upon motion under Section 2255. All questions pertaining to the proof adduced at the trial must be raised upon direct appeal in the proper forum. This Court has restated this proposition of law as recently as 1955 when it stated in the case of *Hanley* v. *United States*, 95 U.S. App. D.C. 400:

> A question of proof at the trial in which the prisoner has been convicted cannot be raised by a motion to vacate under Sec. 2255. *Finan* v. *United States*, 4 Cir., 1919, 177 F.2d 850.

To the same effect see *Adams* v. *United States*, 95 U.S. App. D.C. 354, 222 F.2d 45 (1955). It has also been held that if evidence is secured as a result of an alleged illegal search and seizure, relief cannot be had by motion to vacate under Section 2255. See *Smith* v. *United States*, 88 U.S. App. D.C. 187 F.2d 192 (1950), *cert denied*, 341 U.S. 927 (1951).

WHEREFORE, it is respectfully submitted that petitioner's application for relief under 28 U.S.C. be denied.

/s/ OLIVER GASCH
United States Attorney

/s/ ARTHUR J. MCLAUGHLIN
Assistant United States Attorney

F IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Findings of Fact and Conclusions of Law—Filed Nov. 14, 1957

This is a motion under 28 U.S.C.A. § 2255, to set aside a sentence this court imposed on the defendant on May 3, 1957 based on a conviction for robbery. An oral hearing was had on October 25, 1957, with counsel on both sides present.

FINDINGS OF FACT

1. On April 26, 1956, two members of the Metropolitan Police Department obtained a warrant from the Municipal Court of the District of Columbia for the arrest of the defendant on the charge of armed robbery. Four days later, on April 30, the Chicago Police Department informed our local police that they had the defendant in custody.

2. Two members of the District of Columbia Police Department went to Chicago on May 2. They talked with the defendant for about an hour on the afternoon of May 2, and reduced a statement he made to writing.

3. Although defendant agreed to waive extradition, the police were not able to get reservations to return him to Washington until May 4. The defendant and the two members of the Metropolitan Police Department arrived in Washington about 4:15 P.M. on May 4, and reached the police headquarters that same day about 5 P.M.

4. There he was charged with robbery, placed in a line-up and then sent to No. 1 Precinct. The next morning, on May 5, he was arraigned before the U.S. Commissioner for the District of Columbia. Although the District of Columbia Police had obtained a U.S. Commissioner's warrant in Washington before they went to Chicago, they did not take the warrant with them.

5. The confession made to the members of the Metropolitan Police Department was voluntary and was not the result of coercion, threats or promises.

6. The grand jury indicted the defendant on June 4, 1956 on a charge of robbery and on August 30, 1956, he entered

a plea of guilty. He was later sentenced to a term of from three to twelve years.

7. Defendant later was allowed by the court to withdraw his plea of guilty, and he then entered a plea of not guilty. Defendant went to trial on April 15, and was convicted of the offense of robbery and was sentenced to a term in prison of from four to thirteen years.

CONCLUSIONS OF LAW

Defendant contends that the admission by the trial judge of defendant's confession which allegedly resulted from an unlawful detention invalidated the conviction and sentence. During the trial the court took extensive testimony out of the presence of the jury regarding the circumstances of defendant's confession before it admitted it into evidence.

It seems well settled that a defendant may not seek to vacate a sentence under § 2255 by alleging mere error in the admission of evidence unless such error amounts to a denial of constitutional rights involving the essentials of a fair trial. *Smith* v. *United States*, 88 U.S. App. D.C. 80, 187 F.2d 192 (1950). At page 85 of its opinion the Court of Appeals stated:

> ". . . the admission of confessions obtained by illegal detention is not a ground for collateral attack against the sentence and judgment following thereupon."

See also *Adams* v. *United States*, 95 U.S. App. D.C. 354, 222 F.2d 45 (1955). Therefore, this type of issue may only be raised upon a direct attack on the judgment by way of appeal. A motion to vacate under § 2255 is an extraordinary remedy which is essentially the same as the writ of *habeas corpus*. It is not an acceptable expedient for raising errors of law when the time for appeal has gone by. *United States* v. *White*, 153 F. Supp. 809 (D.D.C. 1957).

Defendant, however, argues that the Supreme Court's ruling, in *Mallory* v. *United States*, 354 U.S. 449 (1957), sets a more exacting test for the admissibility of confessions and that he could probably have obtained a

reversal on appeal had *Mallory* been handed down at an earlier date. Without speculating on this matter, it should be noted that if this issue is non-constitutional and non-jurisdictional, as this court holds that it is, then the statutory right to raise it upon appeal had expired before *Mallory* could take effect.

Defendant next appears to imply that the *Mallory* decision holds that every erroneous admission of a confession creates a defect in the trial proceedings which is constitutional in nature and hence reviewable under § 2255. The court does not understand this to be the purport of *Mallory*. The language of the Supreme Court is explicit. For example the court said at page 450: "Since an important question involving the interpretation of the Federal Rules of Criminal Procedure was involved in this capital case, we granted the petition for certiorari", and again at page 451: "The case calls for the proper application of Rule 5(a) of the Federal Rules of Criminal Procedure . . ." The most that the facts permit this defendant to argue is that the court erred in admitting into evidence a confession obtained during an "unnecessary delay" in violation of Criminal Rule 5(a). This is not a constitutional question and could have been urged only upon direct appeal.

Therefore, this motion to vacate sentence is denied.

/s/ JOHN J. SIRICA
United States District Judge

November 14, 1957

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Notice of Appeal—Filed December 2, 1957

Name and address of appellant: John Hodges, District of Columbia Jail, 200 19th St., S.E.

Name and address of appellant's attorney:

Offense: Robbery

Concise statement of judgment or order, giving date and any sentence:

Denial of Motion for relief under Title 28, Sec. 2255, U.S. Code, filed. 10-25-57. SIRICA, J.

Name of institution where now confined, if not on bail:

District of Columbia Jail
200 19th St., S.E.

I, the above-named appellant, hereby appeal to the
1 United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

JOHN E. HODGES
Appellant

/s/ SUTHERLAND G. TAYLOR
Attorney for Appellant.

Date: December 2, 1957

(File endorsement omitted)

J

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 569-56

UNITED STATES

vs.

JOHN HODGES

Affidavit in Support of Application for Leave to Proceed on Appeal Without Prepayment of Costs and Approval Thereof—Filed November 25, 1957

I, John Hodges, being first duly sworn according to law, depose and say that I am the in the above-entitled cause, and, in support of my application for leave to proceed in said cause without being required to prepay fees or costs, state as follows:

1. That I am a citizen of the United States.
2. That because of my poverty I am unable to pay the costs of said suit or action.
3. That I am unable to give security for the same.
4. That I believe I am entitled to the redress I seek in said suit or action.
5. That the nature of my cause of action is briefly stated as follows: Appeal from Denial of Motion for Relief under Title 28, Section 2255, United States Code.

JOHN E. HODGES

SUBSCRIBED and SWORN to before me this 28th day of October, 1957.

Signature illegible
Notary Public, D. C.

Let the applicant proceed on appeal—Denial of Motion—without prepayment of costs.

JOHN J. SIRICA
Judge

12/2/57

(File endorsement omitted)

K

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1958

No. 14,683

District Court No.
Criminal 569-56

JOHN HODGES, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Before: EDGERTON, FAHY, and WASHINGTON,
Circuit Judges, in Chambers.

Order Denying Request for Trial Transcript But Granting Motion for Transcript on Motion to Vacate—March 30, 1959

Upon consideration of appellant's petition for the transcript of the hearing on appellant's motion for relief under Section 2255 to be prepared at the expense of the United States, of appellee's opposition and of appellant's reply, it is

ORDERED by the court that insofar as appellant seeks to have the trial transcript furnished at the expense of the United States said motion is denied, but that the transcript of the hearing held pursuant to his motion to vacate sentence shall be prepared at the expense of the United States.

Per Curiam.

Dated: March 30, 1959.

(File endorsement omitted)

L IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(Title omitted)

Order Denying Motion to Remand and Directing That Trial Transcript be Prepared at Public Expense—May 18, 1959

Upon consideration of appellant's motion to remand this case to the District Court for a rehearing of the motion to vacate sentence, and it appearing that while the notes of the court reporter on the hearing to vacate sentence cannot be found but that this court is of the view that the issues on this appeal can be adequately determined by reference to the transcript of the trial proceedings, it is

ORDERED by the court that the motion to remand is denied and that the stenographic transcript of the proceedings at the trial shall be prepared at the expense of the United States and that said transcript may be filed as a supplemental record in this case.

Per Curiam.

Dated: May 18, 1959.

(File endorsement omitted)

2 IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(Title omitted)

Motion for Leave to File a Supplemental Record on Appeal, or in the Alternative to Remand to the District Court, and for Leave to File the Brief in This Case Five Days Following the Disposition of This Motion—Filed August 4, 1959

Comes now the Appellant, John Hodges, by his attorneys and moves the court for leave to file the attached affidavits as a supplemental record on appeal in these proceedings. In support thereof, the following is submitted:

1. In the course of the preparation of a brief for Appellant, the present court-appointed counsel have in-

vestigated the records of the District Court, the transcript of the trial, and the pleadings and correspondence filed in this Court. In their attempts to adequately represent the Appellant, a petition was made to this Court for a transcript of the Section 2255 hearing which is the subject of this appeal. The reporter's notes for this hearing have been lost and in lieu of this transcript, this Court ordered the preparation of the trial transcript as a supplemental record on appeal but denied a motion to remand for a new § 2255 hearing.

After a study of the available records of the prior proceedings, present counsel became curious to know why Appellant had failed to take an appeal from his original conviction. A review of the sentencing proceedings and discussions with the Appellant and his former counsel who represented Appellant at the trial revealed that Appellant had never been informed and was unaware of his right to file a notice of appeal from his conviction.

2. The Appellant sought relief in his § 2255 motion from the admission into evidence at the trial of an involuntary confession. The law seems settled that to raise such an issue on collateral attack rather than on direct appeal, the case must present "exceptional circumstances". Such circumstances are shown in the attached affidavits. *Bowen* v. *Johnston*, 306 U.S. 19 (1939); *Sunal* v. *Large*, 332 U.S. 174, (1947); *Smith* v. *United States*, 88 U.S. App. D.C., 80, 187 F. 2d 192 (1950). Of vital importance in this case is the fact that Appellant's direct appeal route was deterred due to the fact that he was uninitiated in the ways of the law and received no advice from either the Court or his counsel of his rights to note an appeal.

3. To bring this essential element to the attention of the Court, it is necessary that the record be supplemented to include the sentencing proceedings and the attached affidavits of the Appellant and his trial counsel.

4. Present counsel is acutely aware of the long delays that have attended this case through no fault of the indigent Appellant and they have made every effort to expedite the appeal. Since receiving the trial transcript they have prepared a brief for the Appellant which is ready to be filed upon the disposition of

this motion. In the interests of justice, however, and to properly represent this Appellant, it is felt that any delay caused by the filing of this motion is absolutely essential. It is only by granting of this motion that the Court will have an adequate record before it upon which to base its disposition.

5. As noted before, one important part of the record on appeal is already missing, namely, the transcript of the § 2255 hearing. Whether the facts outlined in the attached affidavits and sentencing proceedings were touched upon in the course of that hearing is not known. Whether they were or not, we feel that this Court, in the exercise of proper judicial administration, may promptly supplement this record by the addition of these items. By so doing, this Court will be able to decide all of the issues presented on this appeal and thus expedite the disposition of this case. Should this Court decide that the record should show conclusively that the District Court's judgment was based upon this additional information, we move in the alternative that the Court remand the case to the District Court for such a determination.

WHEREFORE, to prevent further delays in the decision on this appeal, we move the Court to grant relief to file the sentencing proceedings and the attached affidavits as a supplemental record on appeal. In the alternative, we move the Court to remand the case to the District Court for supplementation of the court record and a determination in the light thereof.

Respectfully submitted,

/s/ HENRY B. WEAVER
Henry B. Weaver

/s/ QUINN O'CONNELL
Quinn O'Connell
Attorneys for Appellant

CERTIFICATE OF SERVICE

(Omitted in printing)

6 **Affidavit of John E. Hodges**

I, John E. Hodges, Defendant in the case of U. S. v. John E. Hodges, No. 569-56, depose and say the following:

This is my first arrest on a charge other than for minor traffic violations. I am not versed in the law. I do not recall having any conversation whatsoever with Edward L. Carey or John L. Kilcullen concerning the taking of an appeal in my case. I did not know I had only ten days to appeal. Subsequently my wife, Charlotte Hodges, visited me in Lorton, Virginia and she mentioned an appeal. It was at this time too late to file, however. I have not seen my wife for some time and I do not know her present occupation or address.

I did not find out until later the actual time limit within which to appeal. This was when I discussed my legal situation with Mr. Sutherland Taylor and retained him as my attorney. Subsequently, Mr. Taylor filed a motion under Title 28, Section 2255 of the United States Code. I retained Mr. Taylor as soon as I possibly could after I had been convicted and sentenced.

JOHN E. HODGES
John E. Hodges

Subscribed and sworn to before me this 3rd day of August, 1959. My commission expires:

.....
Notary Public, D. C.

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7 **Affidavit of Edward L. Carey and John L. Kilcullen**

AFFIANTS Edward L. Carey and John L. Kilcullen depose and say the following:

We were requested by Charlotte Hodges to defend her husband, John E. Hodges, in the case of United States v. John E. Hodges, No. 569-56. We represented John Hodges in the Court at his trial. We received no fee or compensation for this inasmuch as it was clear that neither Mrs. Hodges nor her husband were able to pay any fee.

On April 15, 1957, after a jury trial which lasted five days, John Hodges was found guilty. On May 8, 1957,

Hodges was sentenced by Judge Sirica to serve a term of four to fifteen years. We were present at the time that sentence was imposed. Immediately after sentence was imposd, John Hodges was removed from the courtroom by the U. S. Marshal and we did not have an opportunity to talk to him.

We do not recall discussing the taking of an appeal with the Deefndant, John Hodges, but after the sentencing proceedings, we did talk to the Defendant's wife, Charlotte Hodges, in the courtroom. At that time we advised her that we strongly felt that she should have John Hodges prosecute an appeal. She indicated that she would discuss it with her husband and would suggest that he request court-appointed counsel to present an appeal. We did not learn until some time later, after time for noting an appeal had expired, that John Hodges had not taken an appeal from his conviction.

EDWARD L. CAREY
Edward L. Carey

JOHN L. KILCULLEN
John L. Kilcullen

Subscribed and sworn to before me this 31st day of July, 1959.

My commission expires: July 31, 1962.

CHARLES A. KATARSKI
Notary Public, D. C.

(File endorsement omitted)

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(Title omitted)

Opposition to Motion for Leave to File a "Supplemental" Record or to Remand the Case to the District Court—Filed August 12, 1959

Comes now the United States by its attorney, the United States Attorney, and opposes appellant's motion for leave to file a "supplemental" record or to remand this case to the District Court.

This is an appeal from an order, containing findings of fact and conclusions of law, denying appellant's § 2255 motion to vacate sentence. Because the reporter's notes were lost, a transcript of the hearing on the § 2255 motion has not been prepared. When it was learned that the reporter's notes were missing, appellant moved that the case be remanded to the District Court for a rehearing of the motion to vacate sentence. On May 18, 1959, this Court denied that motion, stating that ". . . the issues on appeal can be adequately determined by reference to the transcript of the trial proceedings". The Court ordered that a transcript of the trial proceedings be prepared at Government expense and be made a part of the record on appeal. This has been done.

In the instant motion appellant asks that he be permitted to "supplement" the record with affidavits of himself and of his trial counsel alleging that he did not know of the time limit for taking an appeal. The Government opposes the motion for the reason that these affidavits are not part of the record of the District Court.

The record on appeal is made in the District Court. Nothing could be more fundamental. This is basic to our appellate system, by which courts of appeals review lower court rulings on the basis of the same record before the lower court.[1] The instant affidavits were never part of the record in the District Court. The District Court never considered them. Plainly, they do not belong in the record on appeal. The affidavits contain new factual allegations which the Government has not had an opportunity to rebut, either by way of cross-examination or counter affidavit. Nor have these allegations, made for the first time in this Court, been passed on by the District Court.

Appellant cites absolutely no authority in support of his attempt to add to the District Court record. Rule 75(h), F.R. Civ. P. governs motions to correct or modify a record,

---

[1] Section 2255 does not authorize this Court to entertain a motion to vacate sentence. This Court's jurisdiction is limited to appeals from the disposition of such motions. *Davis* v. *United States*, 175 F. 2d 19 (9th Cir. 1940); *Cf. Brosius* v. *Botkin*, 72 App. D.C. 29, 110 F. 2d 49 (1940).

and allows for supplementation "[i]f anything material to either party is omitted from the record on appeal by error or accident or is misstated therein . . ." Plainly, appellant's motion falls outside the scope of this rule, for appellant does not claim that any part of the District Court record was omitted or misstated.

Moreover, this Court's own rules clearly provide that the record on appeal in both civil and criminal cases shall be composed of the "original papers, which papers and the original exhibits and reporter's transcript on file shall constitute the record on appeal." Rule 12(a). These affidavits, which did not come into existence until months after this appeal was noted, are not "original papers."

Now would it be appropriate to grant appellant's alternative request—to remand the case to the District Court "for supplementation of the court record and a determination in the light thereof." If appellant wants to, he can have this appeal dismissed and then file a new motion to vacate sentence. On the basis of the present record, we see no reason whatever for a remand.

Conclusion

Wherefore, it is respectfully submitted that appellant's motion be denied.

/s/ Oliver Gasch
Oliver Gasch,
United States Attorney.

/s/ Carl W. Belcher
Carl W. Belcher,
Assistant United States Attorney.

/s/ Louis M. Kaplan
Louis M. Kaplan,
Assistant United States Attorney.

11 Certificate of Service

(Omitted in printing)

(File endorsement omitted)

12 IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,683

(Title omitted)

Reply to Government's Opposition to Motion for Leave to File a "Supplemental" Record or to Remand the Case to the District Court—Filed August 18, 1959

Comes now the Appellant, John Hodges, by his attorneys, in reply to the United States' Opposition to Appellant's Motion filed herein.

The Government's opposition is based upon the claim that the affidavits sought to be filed by the appellant "are not a part of the record of the District Court" (Opposition, p. 1). The Government further claims that the appellant's motion to supplement the record falls outside the scope of Rule 75(h), F. R. Civ. P. since "appellant does not claim that any part of the District Court record was omitted or misstated" (Opposition, p. 2). It is respectfully submitted that the foregoing contentions of the United States Attorney are based upon a misconception of the facts of this case and a misunderstanding of the purpose of appellant's motion.

First, appellant has consistently maintained that the most substantial part of the District Court record which is here on appeal has been omitted and is missing. Indeed, earlier in its Opposition, the Government recognizes that "because the reporter's notes were lost, a transcript of the hearing on the § 2255 motion has not been prepared" (Opposition, p. 1). This court has also recognized this fact and, in its Order of May 18, 1959, it provided for the preparation of

13 a transcript of the trial proceedings as a supplemental record on appeal. Of course, this transcript of the trial proceedings is not a part of the record of the District Court which is here under review.[1] There are many unusual aspects to this case which are important to bear in mind, one of which is that this appeal must be determined on the basis of "supplemental" records because of the absence of an essential part of the actual record.

The attempts o. the Government to invite the supplementation of the record when it appears beneficial to the prosecution[2] and to contest it when the benefits are not so apparent not only show an obvious inconsistency but smack of unfairness.

The reason for appellant's motion to supplement the record with certain affidavits is not the least insidious. The appellant simply wants to make certain that this court reviews the substantial questions which were passed upon by the District Court. Without the information in the affidavits there might be some doubt as to whether the court could properly undertake such a review. The specific matter under review is the holding of the District Court Judge that the question raised in appellant's § 2255 motion "is not a constitutional question and could have been reached only upon direct appeal."[3] In view of the lack of a transcript of the §2255 hearing, it is not known whether the reasons for appellant's failure to take a timely appeal from his conviction were known to the District Court Judge. In view of the District Court's holding that a constitutional question was not involved, such information would
14 be immaterial. To allow this court to consider the merits of the District Court's holding it appears that it is necessary for this court to know why a direct appeal from the original conviction was frustrated. The purpose of the affidavits is merely to supply this missing link and thus satisfy the procedural requirements so that the court might go straight to the heart of the problem. The affidavits have no bearing on the merits of the question of whether appellant's conviction was based upon a violation of his constitutional rights. An answer to this question by this court has already been long delayed, through no fault of the indigent appellant.

The Government's suggestion that the appellant dismiss his appeal and file a new motion to vacate sentence is most extraordinary. Such a procedure would first of all cause unnecessary further delay in the final disposition of this

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[2] See Opposition to Motion to Remand filed by the United States in this case on May 6, 1959.

[3] *United States* v. *Hodges*, 156 F. Supp. 313 at 315 (D.C. D.C. 1959).

case. More important, and the Government is no doubt well aware of this, the result of such a procedure would likely be complete dismissal of the motion since it would necessarily raise precisely the question which is now before the court.[4] This, of course, would preclude forever a decision on appellant's claim.

Conclusion

The present record on appeal in this case is sufficient to decide the merits of the Appellant's claim. By supplementing this record with the affidavits of the appellant and his trial counsel, the court, despite the absence of the actual transcript of the § 2255 hearing, can properly determine whether the merits of appellant's claim entitle him to relief.

Wherefore, it is respectfully submitted that appellant's Motion for Leave to File Supplemental Record, or, in the alternative, that the motion to remand to the District Court for supplementation of the record be granted.

Henry B. Weaver, Jr.
Henry B. Weaver, Jr.

Quinn O'Connell
Quinn O'Connell

Attorneys for Appellant
Appointed by the Court
of Appeals

Certificate of Service (Omitted in printing)

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[4] Cf. *Smith* v. *United States*, ... U.S. App. D.C. ...., ... F. 2d .... (No. 14599, decided July 7, 1959).

(File endorsement omitted)

16 IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(Title omitted)

Order Denying Motions to Supplement the Record or to Remand—Aug. 28, 1959

Upon consideration of appellant's motion for leave to file a supplemental record on appeal or in the alternative to remand this case to the District Court and for an extension of time to file his brief, of appellee's opposition and of appellant's reply, it is

ORDERED by the court that insofar as appellant moves to supplement the record or to remand this case to the District Court said motion is denied.

It is FURTHER ORDERED by the court that the time for filing appellant's brief is extended until September 6, 1959.

Per Curiam.

Dated: August 28, 1959

IN UNITED STATES DISTRICT COURT

Excerpts From Transcript of Proceedings—April 10, 1957

The above-entitled matter came on for hearing before Honorable JOHN J. SIRICA.

APPEARANCES:

On behalf of the government: ARTHUR J. MCLAUGHLIN, Esq.

On behalf of the defendant: EDWARD CAREY, Esq., and JOHN KILCULLEN, Esq.

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HAROLD P. PARKS

Direct Examination

By Mr. McLaughlin:

• • • • • • • • • • •

Q. Where are you employed? A. Briggs & Company.

Q. And were you so employed on June 30, of '55? A. Yes, sir.

Q. Where was Briggs located on June 30, 1955—July, rather? A. 454 11th Street, Southwest.

Q. Is that in the District of Columbia? A. Yes, sir.

Q. What was the nature of your employment with the Briggs Company? A. Cashier.

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22 Q. Prior to July 30 of 1955, did you know a man by the name of John Hodges? A. Yes, sir.

Q. Can you tell us prior to July 30 of '55 whether or not he was ever employed by the Briggs Company? A. Yes, sir; he was.

Q. In what capacity, if you know, was he employed by the Briggs Company? A. He was a route salesman.

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Q. While you were in your office there on the morning of July 30, '55, did something unusual happen between the hours of 6:00 and 7:00, I believe, in the morning? A. A little after seven—I was held up.

Q. Just tell us what happened a little after seven a.m. on July 30. A. I was sitting at the desk, taking care of my work and two men came in the office; one of them with a gun. I was ordered to come around in front of the desk and lie on the floor.

Q. Did you later learn the identity of the man who had the gun? A. Yes, sir; I did.

Q. Did you later learn his name? A. Yes, sir.

Q. What was his name? A. Frank Hodges.

Q. Go ahead. What else happened? A. I laid on the floor there. They cleaned the place out and I believe it was Frank, said "Stay there for five minutes or I will blow your brains out",—something to that effect.

Q. What do you mean "they cleaned the place out"? A. They took the money.

Q. Where was the money? A. The money was on the desk, and there was some money in a drawer to my left.

Q. How much money was there? A. How much money was on the premises?

Q. No, in front of you? That they took. A. They took $4,950.

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Q. I believe my question was, Mr. Parks, did you later learn the name or identity of the man who came in
23 the premises with Frank Hodges? A. Yes, sir.

Q. His name was what? A. Thomas Stramer.

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Cross Examination

By Mr. Carey:

Q. Mr. Parks, at no time did you see the defendant John Hodges on the premises on the particular date to which you make reference that the robbery occurred? A. No, sir.

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CHARLES FITZGERALD

Direct Examination

By Mr. McLaughlin:

Q. Officer, your full name is what? A. Charles Fitzgerald.

Q. Where do you live? A. I live at 2658 Wilson Avenue, Chicago, Illinois.

Q. Where are you employed? A. City of Chicago, Department of Police.

Q. In what capacity? A. Detective.

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(The witness resumed the witness stand, and the following proceedings took place out of the presence of the jury:)

By Mr. McLaughlin:

Q. I believe my question was: Under what circumstances did you arrest the defendant, John Hodges? A. We arrested him on information received from Captain McCarty of the Washington—

Q. What information was that? A. That two men, Frank and John Hodges, were wanted in Washington for robbery.

Q. Robbery of what? A. It just stated "robbery" and it stated that the men were to receive a phone call at 7:00 o'clock that evening. They gave us the phone number.

With that information we went to the address at 4135 Greenview Avenue, where this phone was located.

Q. In this information that you received from
24 Washington here, was there any mention as to the name of the place robbed and the amount of moneys taken? A. Yes, it named the Briggs Company, Washington, D. C., listed the amount of money that was stolen.

Q. As a result of that information, where did you go or what did you do? A. We went to 4135 North Greenview Avenue, and found it to be a rooming house.

We found that Mr. John Hodges resided in a small apartment there with his wife and children.

Q. What happened next? A. We knocked on the door and Mr. John Hodges came to the door, and we identified ourselves as police officers.

We told him he was wanted for robbery in Washington, D. C. He asked us to come into the apartment and we walked into the apartment. We asked him if it was all right for us to look around and he says it was.

I asked John if he had any guns in the apartment. He said that he did.

The Court: He said he did?

The Witness: He did.

I asked him where were the guns. I asked him if—he told me he had two guns in his suitcase. He pointed to the suitcase and took it off the shelf and opened the suitcase.

I found one 32 caliber break-open revolver and nine rounds of ammunition from a 38 caliber revolver.

By Mr. McLaughlin:

Q. What time was this that you went to his apartment? A. It was about nine o'clock in the evening of April 29.

Q. After you say that you found this revolver, then what next happened while you were in the apartment? A. I asked him if he knew anything about the robbery. He told me that he didn't know anything about any robbery.

Q. What else? A. I told him I would have to take him down to the detective bureau, that the Washington
25 Police Department were forwarding the warrant for him and his brother. I didn't find his brother there. I did tell him the warrants were being forwarded.

Q. What did you do with the defendant? A. I took him to the Detective Bureau lockup. I lodged him in the Detective Bureau lockup.

Q. Where was that located? A. 1121 South State Street.

Q. What time would you say you lodged him in the detective lockup? A. About nine thirty p.m., at night.

The Court: Excuse me. Let me follow this. Detective locker, did you say?

The Witness: Detective Bureau lockup.

The Court: "Lockup". I didn't get the word you said.

By Mr. McLaughlin.

Q. What time did you say you locked him up up there? A. About nine thirty.

Q. On the evening of April 29? A. April 29. Yes.

Q. When did you next see the defendant, John Hodges? A. I next saw John Hodges on the first of May. That was when the warrants were received.

Q. You say you received warrants on the 1st of May, 1955? A. Yes.

Q. And those warrants were received from where? A. They were received from the Washington, D. C., Metropolitan Police Department.

Q. Where had John Hodges been from April 29th until May 1st; did you say? A. That is correct—May 1st.

Q. Where had he been during that time, if you know? A. In the Detective Bureau lockup.

Q. Had he been brought before any Magistrate during that time? A. He was brought before the Magistrate on the 1st of May when the warrants were received.

Q. Had you questioned him at all during that interim as to the robbery here in Washington? A. I questioned him right after I took him into custody and asked him about the robbery in Washington.

26 Q. That was on the 29th, is that right? A. That is correct.

Q. On April 1st was he arraigned before some—

The Court: May 1st, isn't it?

By Mr. McLaughlin:

Q. May 1st. A. May 1st.

Q. Was he arraigned before some Magistrate there? A. That is correct.

Q. Do you recall the name of the Magistrate? A. It was the Chief Justice of the Criminal Court. Judge Richard Austin.

The Court: Judge who?

The Witness: Richard Austin.

By Mr. McLaughlin:

Q. What happened at the arraignment before that Magistrate? A. He signed a waiver.

Q. Who signed a waiver? A. John Hodges.

Q. Signed a waiver for what? A. That he was willing to go back to Washington.

Q. After that incident on May 1st, before the Magistrate, then what next happened, as far as the defendant John Hodges? A. He was turned over to the custody of the Sheriff of Cook County.

Q. For what purpose? A. To await the messenger from Washington, D. C.

Q. Did you question him at any time after that, after May 1st, in regard to this Washington robbery? A. No; I didn't.

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Q. On May 1st when the defendant was arraigned before the Magistrate and you said signed a waiver to return to Washington— A. That is correct.

Q. —what did the Chicago Police do then, if anything? A. After he was turned over to the custody of the Sheriff then he remained in the custody of the Sheriff until the arrival of the Police Messenger from Washington.

Q. After, you say, he waived, to go back volun-
27 tarily, did the Chicago Police notify the Washington Police of that fact? A. Yes. They did.

Q. Can you recall when the Chicago Police notified the Washington Police of the fact that the defendant was willing to come back voluntarily? A. At the time he was arrested I asked him if he would go back to Washington. He said that he would be willing to go back, and I asked him if he waived extradition, and he said that he would. We immediately notified Washington of the arrest, and that John Hodges stated that he was willing to return to Washington. It was directly after the arrest.

Q. I believe you testified that you received the arrest warrants from the Washington Police on May 1st; was that right? A. That is right.

Q. Was there any reason for the Chicago Police holding this defendant from April 29th to May 1st without bringing him before that Magistrate? A. Yes.

Q. What was that? A. We didn't have the warrant.

Q. In other words you couldn't bring him before the Magistrate until you had the warrant? A. That is correct.

Q. When was the defendant turned over to the Washington Police, if you know? A. He was turned over at 11:20 a.m. on May 3rd.

Q. Where had the defendant been, if you know, from May 1st to May 3rd when he was turned over to the Washington Police? A. He was in custody of the Sheriff of Cook County and just previous to the time he was turned over, he was returned to the Detective Bureau where he was fingerprinted and then turned over to the Washington authorities. And that turnover was made on May 3rd, at 11:20 a.m.

Q. After—that is May 1st—up until the time he was turned over to the Washington Police, on May 3rd, did you

ever question him at all any further in regard to these Washington robberies? A. No, I didn't.

Q. As far as you know, was he questioned by any other members of the Chicago Police about these Washington robberies? A. As far as I know, he wasn't.

28 Mr. McLaughlin: That is all.

The Court: Mr. Carey.

Cross Examination

By Mr. Carey:

Q. What time was it that this man was arrested in Chicago? A. About 9 p.m. on the evening of April the 29th.

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Q. What location? A. Location of 4135 Greenview Avenue.

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Q. How did you get into that apartment? A. It is a rooming house. I went to the person that rented the rooms there. The phone was in the hall. I told that person that I was a police officer and that I was looking for a Mr. John Hodges, and he was to receive a call on that telephone at 7:00 o'clock. I asked her if I could wait in her apartment.

She allowed me to wait in there until 7:00 o'clock and there was no phone call.

Q. Where was that phone call to be received, in the landlady's apartment? A. It is a phone that is in the hall of—it is a rooming house. The phone wasn't in his apartment.

Q. Out in the hall, is that correct? A. That is correct.

Q. No phone call was received, is that correct? A. That is correct.

Q. Did you make any attempt to get into the Hodges' room at all after the failure of the phone call to come through? A. I knocked on the door and there was no answer. I didn't make any attempt to get in there.

We had intimation that he was driving a Pontiac automobile, and that car wasn't out front, and the landlady said if he was home the car would be parked in front of the house. The car wasn't there.

We waited in her apartment and the car didn't come. That is right. The car didn't come and the lights went on in the apartment and we saw the light go on and we knocked on the door. That was some time later.

Q. By "We" whom do you— A. My partners, Herbert Wilke and Richard Moser.

Q. How did you get into that apartment? A. We knocked on the door. He opened the door.

Q. Who opened the door? A. Mr. John Hodges.

Q. Was your gun drawn at that time you entered this apartment? A. No.

Q. You didn't force your way into that apartment? A. No; I didn't.

Q. You are sure about that? A. I am sure of that.

Q. At any time did you pull your gun while you were walking around the premises inside? A. No; I didn't.

Q. What did you say to these people when you went into that room? A. Said that we were the police, and identified myself, and I told him that he was wanted—I asked if he was John Hodges.

Q. Did you have a warrant with you at the time you entered this man's home? A. I didn't have a warrant.

Q. Did you ever have a warrant to go into this man's house? A. I had a warrant for his arrest that was forwarded from Washington.

Q. That was later, was it not? A. That was later.

Q. At the time that you went into this man's home, you had no arrest warrant of any description? Is that correct? A. That is correct.

Q. When was it that you received the warrant from Washington? A. On May 1st.

Q. You arrested this man April 29, is that correct? A. That is correct.

Q. What time of day was it that you received the arrest warrant, if you can recall? A. It was received about 2:00 p.m. in the afternoon.

Q. Did you have a search warrant to search the premises on this man in Chicago? A. No. I didn't.

Q. Did you ask permission to search the premises? A. Yes, I did.

Q. They invited you into the room. They gave you permission to search the premises; is that correct? A. That's right. That's correct.

Q. Everything was done with their permission? A. That's correct.

Q. At no time did you have a gun drawn or any of your partners; is that correct? A. That's correct.

Q. How long did you stay in the apartment? A. It may have been fifteen minutes.

Q. What did you do during those fifteen minutes which you were in the apartment? A. I talked to his wife.

Q. Did you attempt to remove the mattress from the bed at any time? A. No; I didn't.

Q. Did you rip the mattress at any time? A. No, I didn't.

Q. Did you upset the bed at all? A. No, I didn't.

Q. Did you pull the cords from the lamp at all? A. No.

Q. Did you direct his wife to bend over and put the cord into the socket? A. No, sir.

Q. Did your partner or anyone with you do that? A. No, sir.

Q. Did you and Hodges have any words about your directing his wife to do certain things because she was pregnant at the time? A. No, sir.

Q. Did he aprise you of the fact his wife was pregnant? A. I believe he did.

Q. Did you tell her to bend over and put that electric cord into the socket? A. I don't remember any electric cord being put in or out of a socket.

Q. Did he tell you you were not to tell his wife to do that, that he would do it? A. No, sir.

Q. That never occurred? A. No, sir.

Q. Did you go through his bags without his per-
31 missions? A. No, sir.

Q. Did you remove a gun from such bag? A. Yes, I did.

Q. You were given permission to go through the bag; is that correct? A. That's correct.

Q. How many guns, if any, did you find in the bag? A. One gun.

Q. What else did you find, other than the gun? A. I

found the one gun and I found seven or eight rounds of 38 caliber ammunition.

Q. Then what did you do after you got the guns from the bag? A. Put the gun in my pocket.

Q. What did you do with the defendant Hodges? A. Took him to the Detective Bureau.

Q. What time of day was it you took him to the Detective Bureau? A. Shortly after we had entered the apartment.

Q. What time would that be, approximately? A. Around nine o'clock in the evening.

Q. Did you interrogate him when you got him to the Detective Headquarters at all? A. No, sir. I asked him when I first talked to him if he had committed the robbery and he denied it.

Q. Did you ask him many questions or just a few questions? A. I just asked him if he committed a robbery and I asked him also how they knew about him. He said that he had trouble with his wife. He thought his wife was trying to make trouble for him.

Q. If I understand you correctly, you asked him to—well, first you asked him did he commit the robbery that allegedly occurred in Washington; and secondly, you asked him how the Washington Police knew he was in Chicago; is that correct? A. That was to that effect.

Q. During the time that you had this man under arrest until you placed him in the cell block, you asked him two questions, is that correct? A. I asked him about the robbery, if he committed the robbery. It may have more than two questions.

* * * * * * * * * *

Q. How many questions did you ask the defendant
32 Hodges during the time he was in custory? A. That I wouldn't be able to answer.

Q. When you suggested earlier two, do you now want to change that testimony? A. No; I asked him about the robbery. If I asked him about a robbery I may ask him if he committed the robbery, and he said "No", and then I asked him how did they know about it. There may have been more than two questions in order for me to ask him that.

I didn't just say "Did you commit the robbery?" and he would say "No." Then I wouldn't just leave it go. I may ask him, what about the gun, or I may have asked him a few other things. It has been quite some time ago.

I do know this, I didn't investigate the robbery in Washington. It was none of my concern. I asked him if he had done that robbery and he said "No."

Q. Then you arrested him at nine o'clock and you got him to Detective Headquarters and placed him in the cell block about what time? A. About nine thirty or shortly afterwards.

Q. You left him at that time, is that correct? A. That's correct.

Q. When again did you see Mr. Hodges? A. On the first of May.

Q. At no time did you interrogate Hodges from April 29 at nine thirty when you placed him in the cell block until you again saw him on May 1st; is that correct? A. That's correct.

Q. Where was it you saw him on May 1st? A. I saw him in the Robbery Detail Office.

Q. What was he doing there, if you know? A. He had been returned from the County Jail. He was to be turned over to the Washington Police.

Q. What time did the Washington Police arrive? A. Around 2:00 o'clock in the afternoon of May 3rd, they arrived to take him back.

Q. Do you know of your own knowledge whether this man Hodges was interrogated by the Chicago Polic between nine thirty on Sunday, April 29 until May 3rd
33 in the afternoon when the Washington Police arrived? A. As far as I know, he wasn't.

Q. How many hours a day would you work as a detective? A. It varies. When I work on a case I may work ten hours, maybe twelve, or I work as long as forty-eight hours without going home, whenever I am assigned to a case.

This particular day I wasn't assigned to any investigation as far as Mr. Hodges' robbery in Washington was concerned. We had other things to do.

Q. Do you know if other Chicago detectives interrogated

this man during the time between April 29 and May 3rd, when the Washington Police arrived? A. As far as I know, he wasn't interrogated by any others.

Q. You don't know? A. As far as I know, he wasn't.

Q. Was he ever placed in the lineup by the Chicago police? A. He may have been.

Q. You don't know, is that correct? A. That's the procedure there that is followed many times, to take people out of the lock-up and put them into a lineup, if there is somebody that may be there to identify someone.

Q. Did the Washington Police have any warrants when they arrived on May 1st, do you know? A. The warrants were in our file in the Chicago Police Department. They had been sent there airmail special delivery.

Q. When did this arrive, if you know? A. They arrived there on the 1st of May.

Q. Were you present at the time when Mr. Hodges was brought before the Chief Magistrate in Chicago in connection with extradition? A. No, sir; I wasn't.

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Q. Was he advised of his Constitutional rights, he had the right to remain quiet if he so wished?

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A. I wasn't there, so I couldn't say.

34 Q. You don't know if he was advised of his Constitutional rights? A. No.

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JOHN CURRAN WILSON

Direct Examination

By Mr. McLaughlin

* * * * * * * * * *

Q. As a member of the Metropolitan Police Department assigned to the Robbery Squad on July 30, 1955, or shortly after that, did you or were you assigned in the investigation of a robbery alleged to have taken place at Briggs—A. Yes, sir.

Q. —on 11th Street, Southwest, in Washington, D.C.? A. Yes, sir.

Q. Was there anyone else assigned with you as to that particular robbery? A. Detective Sergeant Greco.

Q. As a result of that assignment, did you have an occasion to go to Briggs Company on 11th Street, Southwest, in Washington, D.C.? A. Yes, sir, I did.

* * * * * * * * * * *

Q. When you went to those premises, did you talk to any particular person? A. Talked to Mr. Parks.

Q. What information did you receive from Mr. Parks in regard to the robbery?

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A. I talked to Mr. Parks, Detective Sergeant Greco and I did, and he stated that approximately seven o'clock that morning he was alone in the office on the second floor, the rear room of the Briggs Company. I think it is in the 400 block of 11th Street. And suddenly two men came up and one of them placed a gun on him, forced him to lie on the floor, and another man took approximately $5,000—it turned out to be $4,900-some odd—and put it in a white-looking bag and left.

He gave us a description of the men. In fact, he
35 had given the description earlier to the men who had originally responded on the call. That description had been sent out.

Certain information we got from him relative—

Q. You did get that from him, a description of the two that came in the place; is that right? A. Yes, sir.

Q. As a result of your investigation and talking to Mr. Parks at that time, did you make a further investigation of this robbery? A. We talked to several—

Q. Your answer is "Yes"? A. Yes.

Q. As a result of your investigation after talking to Mr. Parks, did you receive certain information from some particular person, and don't name the person? A. Yes, sir.

Q. The information that you received from that person was in regard to the Briggs robbery, of Mr. Parks? A. Yes, sir.

Q. What information—just don't mention names—did you received from that person? A. From this source of information received the names of three persons who had pulled the Briggs' robbery.

Q. And was the person who gave you that information in a position, as far as you know, to know of what she told you— A. Yes.

Q. Have knowledge of what she told you—put it that way? A. Yes, sir.

Q. As a result of the information received from this individual, what did you do, if anything? A. We took a statement and—a signed statement.

Q. Did you apply for a warrant? A. Applied for a Police Court warrant.

Q. Applied for a warrant for how many people? A. Three.

Q. Can you name those three? A. Tommy Straymer, Frank Hodges, and John Hodges.

Q. After applying for those three warrants, which one of the three were arrested first? A. Straymer.

Q. When Straymer was arrested, did you question him, or Officer Greco question him in your presence? A. Yes, sir.

36 Q. The questioning of Straymer, was that in regard to the alleged robbery of July 30, of Briggs? A. Yes.

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Q. When Straymer was arrested, did you question him as to this Briggs robbery? A. Yes, sir.

Q. What information did you receive from him as to the Briggs robbery, of Mr. Parks? A. He told us that he, Frank, had entered the Briggs establishment in the 400 block of 11th Street, while John waited outside in a stolen automobile.

He stated that Frank had placed a gun on Mr. Parks and that he had taken the money.

He stated that all three of them drove over into Virginia some place—he didn't know exactly where, around Alexandria—and there the money had been divided up, each of them getting approximately $1,600, and they had come back to the District of Columbia.

Q. All this information was obtained by the Metropolitan Police before any wire was sent to Chicago for the apprehension of this defendant; is that right? A. Yes, sir.

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Q. This information that you had received from this source that you say is reliable, or should have knowledge to know, and also talking to Straymer, had that information all been relayed to Captain McCarty? A. It had.

That was prior to Captain McCarty's sending a teletype to Chicago for the arrest of this defendant; is that right? A. Yes, sir.

Q. After you applied for the warrant in the Police Court, did you have any information as to the whereabouts of the defendant John Hodges? A. We were told that they were in Tampa, Florida.

Q. Can you recall the approximate date that you applied for the warrant in Police Court? Have you got a record of it there? A. Yes.

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Q. After you applied for those warrants in Police
37 Court, what happened to them? A. I sent them to the Police Department of Tampa, Florida.

Q. Those warrants were for whom? A. John Hodges and Frank Hodges.

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Q. After you had sent the warrants for John Hodges to Florida, did there come a time when you had information as to the whereabouts of John Hodges? A. Yes, sir.

Q. Will you tell approximately when that was? A. It was on a Sunday. I don't recall the exact date. It was April 28th or 29th.

Q. April 29th? A. We learned they were in Chicago.

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Q. After that information—you say April 28th or 29th—was relayed to Chicago, did there come a time you as a member of the Metropolitan Police Department had received any information as to whether or not the defendant John Hodges was apprehended in Chicago? A. Yes, sir.

Q. When did you receive any information, as a member of the Metropolitan Police Department, that John Hodges was in Chicago after April 28th or 29th of '56? A. I was notified at my home about five o'clock on Monday—I guess it would be May 1st, I believe—that John Hodges was arrested in Chicago.

Q. After that information was received by you, did there come a time when you later saw Detective Greco? A. Yes, sir.

Q. When did you see Detective Greco? A. I saw him Wednesday morning.

Q. Did Officer Greco do anything in your presence in reference to the apprehension of the defendant in Chicago? A. No, sir; he didn't.

Q. I will ask you this: Do you know whether or not after you had received the information that the defendant was apprehended in Chicago by the local police, whether or not Officer Greco secured any other arrest warrant? Do you know that, or learn it later? A. I learned it later, that he had secured a Commissioner's warrant.

38 Q. Do you know when he had secured a Commissioner's warrant? A. I couldn't say as to the date. I think it was on Monday.

Q. What? A. I think it was on Monday.

Q. That would be what date? A. May 1.

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Q. What did you do after that in reference to the apprehension of the defendant, John Hodges? A. At that time we didn't know whether Hodges would return to the District of Columbia.

Q. What did you say? A. We didn't know whether he would return voluntarily. Tuesday was my day off. I don't recall whether I came to the office or not. I don't believe so.

However, I was notified some time Tuesday that we would leave on Wednesday for Chicago by air.

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Q. What information did you receive from Captain McCarty? A. He told me that we would go out there and—fly out to Chicago—bring back the two Hodges who were wanted by the Department.

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Q. When did you leave for Chicago? A. It was about eight o'clock the morning of—Wednesday, it would be a Wednesday—the 3rd or 2nd.

Q. The 2nd? A. The 2nd.

Q. And who left with you? A. Detective Sergeant Greco.

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Q. What time would you say you arrived in Chicago? A. I believe it was around 11:30 their time.

Q. That is a.m.? A. Yes, sir.

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Q. When you arrived in Chicago where did you go? A. We went to the Police Headquarters. I think it is on State Street in Chicago.

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Q. Who did you see there? A. Saw Frank Hodges.

Q. What time would you say that was, approxi-
39 mately? A. Approximately 1:30 or a quarter to two in the afternoon.

Q. In the afternoon? A. Yes, sir.

Q. After you saw Frank Hodges at that time, then what did you do or where did you go? A. At that time Frank Hodges was released into our custody and we took him to the Robbery Squad Office.

At that time we started to question Frank Hodges.

Q. You started questioning Frank Hodges? A. Yes, sir.

Q. What time would you say you started to question Frank Hodges? A. 2:00 o'clock or shortly thereafter; quarter after two.

Q. Who was present when you questioned Frank Hodges? A. Just Detective Greco.

Q. How long would you say that you spent there with Frank Hodges? A. Approximately an hour, forty-five minutes.

Q. Was a statement taken from— A. Yes, sir.

Q. —Frank Hodges? A. Yes, sir.

Q. Was it reduced to writing by you? A. Yes, sir.

Q. After you spent that time with Frank Hodges where did you go or what did you do next? A. About that time one of the Chicago authorities brought John Hodges to the Robbery Squad.

Q. When they brought John Hodges to the Robbery

Squad approximately what time would you say that was? A. I would say around 3:00 o'clock.

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Q. Tell us everything that was said at that time by you, Greco, or the defendant, John Hodges? A. He was taken in a small room off of the headquarters room, and we introduced ourselves to him and told him what we were there for.

Q. What did you tell him you were there for? A. Told him we were there—he had been identified—we had warrants for him for robbery of the Briggs Meat Company. At that time he disclaimed any knowledge of it.

Q. What did he say? Give us in substance—we don't expect you to give it verbatim. A. He denied knowing anything about the robbery.

Q. Say what he said. A. He said he wasn't involved.

Q. Go ahead. What else? A. We talked back and forth.

Q. What did you talk about? A. About certain statements that we had already taken.

Q. Those statements were from whom? A. From Straymer and from Frank Hodges.

Q. Tell us the conversation you had so the Judge will know. A. We told John that Straymer had confessed his portion of it and also Frank had confessed, and their confessions had placed him on the scene as being the finger man in the case.

Q. Go ahead. A. At that time he said, "Well, O.K. I will," and we asked him if he would give us a statement. He admitted it orally first. We asked if he would give us a written statement and he said yes, he would give us a statement as to his portion in the case.

Q. Do you recall whether at that time either you or Officer Greco told him any statement he might make would be used either for or against him in court and he didn't have to make a statement if he didn't want to? A. Yes, sir.

Q. Just tell us what you said to him? A. We read off a heading that is on all forms that we take statements on, informing him of his rights, that any statement that he gave would be given freely without any duress and that anything that he might say could be used against him in court.

At that time we asked if he wanted to make a statement, and he said, "Yes," he would make a statement.

Q. Was a written statement taken from the defendant John Hodges? A. It was.

Q. Tell us, if you will the mechanics of taking that statement. You know what I mean by that? A. We just sat down and asked him to give us in his own words if possible exactly what transpired.

He told us his portion of what had happened, what had led up to the robbery.

41 Then we asked him to sign it. He signed it in front of us.

Q. Who did the typing? A. I typed it.

Q. That is what I wanted to know. A. I did the typing. Officer Greco was sitting there, and Hodges.

Q. At the conclusion of that statement was it read back to him or was the defendant allowed to read the statement himself? A. He read the statement himself.

Q. Was it signed by the defendant in your presence? A. It was.

Q. At the time that the defendant signed that statement, were any promises made by you to him— A. No, sir.

Q. To make such a statement? A. No, sir.

Q. Was any coercion or any threat of any kind made? Either by you or Greco or anyone in your presence— A. No, sir.

Q. —to the defendant, to make that statement? A. No, sir.

Q. You say that statement was freely and voluntarily made by the defendant? A. Yes, sir.

Q. Do you have that statement with you? A. Yes, I do.

Q. May I see it, please?

(The witness handed a document to counsel.)

Mr. McLaughlin: I will mark that, Your Honor, as Government's Exhibit for identification Number 2.

The Deputy Clerk: Government's Exhibit 2 for identification.

(Document was marked Government's Exhibit Number 2 for identification.)

By Mr. McLaughlin:

Q. I will show you Government's Exhibit marked for identification Number 2, and ask you if that is the signature of the defendant, in the lower right-hand corner? A. Yes, sir.

Q. Was that signed by the defendant in your presence? A. It was.

Q. Was that statement, the body of that statement, the statement made by the defendant to you and Officer
42 Greco and reduced by you in writing? A. Yes, sir; this is the statement that I took from him in Chicago.

Q. Is there anything that would indicate the time that you started that statement? A. There is an indication of the time it was completed.

Q. Can you recall approximately the time that the statement was started, to your recollection? A. I would say about three thirty.

Q. Is there anything on the statement that would indicate the time that you completed the statement? A. Yes, sir.

Q. What is that? What time would that be? A. 3:35 p.m.

Q. 3:35 p.m. On what date? A. May 2, 1956.

Q. After the statement—Government's Exhibit marked for identification Number 2—was taken from the defendant, then what next happened to the defendant? A. He was placed back in a cell block, I believe, while we attempted to make arrangements to return to Washington.

Q. When you say "arrangements," what arrangements were you trying to attempt to make? A. Had to get plane reservations.

Q. Were those plane reservations finally made? A. They were.

Q. What time would you say they were made? A. We attempted to get reservations on Capital Air Lines inasmuch as Officer Greco and myself had round trip tickets. However, to get four seats was impossilbe. So we went to American Air Lines and at American we obtained four seats on a plane, I believe, leaving the next day, around 11:00 o'clock.

Q. That was May 3rd? A. May 3rd.

Q. I think you said after the statement was taken from Hodges on May 2nd that he was put back into where? A. In the Chicago cell block.

Q. After that, and until the following day, May 3rd, when you say the arrangements were made for this airplane ride, when did you next see the defendant John
43 Hodges? A. Next saw him the next morning, about 10:00 o'clock, I guess, in the Robbery Squad Office in Chicago.

Q. You had not seen him from the time that you left him on May 2nd, to make these arrangements, is that right? A. No, sir.

Q. As far as you know, Sergeant Greco did not see him either? A. No, sir; he didn't.

Q. There was no further questioning of the defendant, as far as you know, pertaining to the robbery in Washington? A. No, sir.

Q. At least not by you and Greco, is that right? A. No, sir. That's right.

Q. When you saw the defendant on the following morning of May 3rd, you say he was in the Detective Bureau in Chicago? A. We were there waiting for them and they came and brought him up from the detention.

Q. What time would you say that was? A. I would say it was around 10:30 in the morning.

Q. Morning on May 3rd? A. May 3rd.

Q. What happened after the defendant was turned over to you? A. Four of us—Frank Hodges, Detective Greco, John and myself—were transported to Midway Airport by the Chicago Police Department to await the departure of our plane.

Q. Did you finally get a plane? A. Got a plane about 1:00 o'clock or 12:30.

Q. In the afternoon.

What time did you arrive back in Washington? A. Right around 4:00 o'clock or 4:15.

On May 3rd? A. May 3rd.

Q. Were you questioning the defendant on the way back— A. No, sir, we were not.

Q. —to Washington from Chicago? A. No, sir.

Q. When you arrived back in Washington you said it was approximately what time, again? A. Right around four o'clock or four fifteen, or thereabouts.

44 Q. In the afternoon? A. In the afternoon.

Q. Where did you bring the defendant Hodges when you arrived back in Washington on May 3rd? A. Brought him to the Robbery Squad in the District of Columbia, we brought him back to the Robbery Squad.

Q. What time would you say you arrived at the Robbery Squad on May 3rd of '56? A. It might have been 4:30.

Q. In the afternoon? A. In the afternoon.

Q. What happened when you arrived back in the Robbery squad with the defendant John Hodges? A. Mr. Parks was there. At that time Hodges read the statement he had given us in Chicago.

Q. When you say Mr. Parks was there, was there any preliminary talk prior to the time that Hodges read his confession to Mr. Parks?

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The Witness: We might have asked him—Mr. Parks was going to be there. I don't recall. It seemed to me we asked him if he would read his statement in front of him.

By Mr. McLaughlin:

Q. When you arrived back at Police Headquarters on May 3rd, Mr. Parks was there; is that right? A. Yes, sir.

Q. At the time that you arrived back at Police Headquarters, who had the confession? Who had possession of the confession that had been previously made in Chicago. A. I did.

Q. In the presence of Mr. Parks at Police Headquarters, what happened in regard to the confession, Government's Exhibit marked Number 2? A. Mr. John Hodges read his confession.

Q. How did he come to read the confession? We want the preliminary steps? What was said by anyone? A. We asked him to read this statement he had given us in Chicago, admitting his portion of the crime, in front of Mr. Parks, and he agreed to do it.

Q. Did he do it? A. He did.

Q. Where did he get the confession from? A. I guess I handed it to him.

Q. Did you hear him read it to Mr. Parks? A. I did.

45 Q. After the confession that was taken from the Defendant John Hodges, Government Exhibit marked for identification Number 2, was read by the defendant to Mr. Parks, what was done, if anything to, or with the confession, either by Mr. Parks or by the defendant Hodges? A. A notation was placed on the bottom of the confession.

Q. By whom? A. I believe Detective Sergeant Greco placed it on there. I would know his writing. I don't recall doing it myself.

Q. I show you Government's Exhibit marked for identification. A. That is Detective Sergeant Greco's writing.

Q. That notation was what? A. "This statement repeated to complainant Parks in the Robbery Squad Office and signed by John Hodges." The date is 5 3 56, 3:30 p.m.

Q. When you say signed by John Hodges, after that sentence or paragraph, if you want to call it that, it was signed at the bottom of this statement by Detective Greco, did John Hodges sign that statement after that? In other words, sign the statement for the second time? A. Yes, sir; he signed it twice.

Q. The second-time was after Greco had inserted this writing, is that right? A. Yes.

Q. Was that writing read to the defendant John Hodges before he signed— A. Yes.

Q. And after—was it signed by anyone else there in your presence? A. By Mr. Parks.

Q. After that last Paragraph? A. Yes, sir.

Q. How long did you remain there at Police Headquarters on May 3rd of '56? A. The usual preliminaries of identification, putting them through the Identification Bureau. I think I left there around 6:30.

Q. In the evening? A. In the evening.

Q. When you left there at 6:30, what happened, if you know, to the defendant Hodges? A. He was placed in the cell block at Police Headquarters.

Q. When was he arraigned, if you know? A. The
46 following morning.

Q. Arraigned before whom? A. I believe arraigned before Commissioner Lawrence.

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Cross Examination

By Mr. Carey:

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Q. Officer Wilson, when did you first learn of the fact that John Hodges was under arrest by the Chicago police? A. I think it was five o'clock on Monday. It would be April 30.

Q. That is the 29th, is it not? A. Could have been the 29th, I don't know.

Q. All right. Monday the 30th at about 5:00 o'clock in the afternoon.

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Q. You received this at 5:00 o'clock on April 30. What did you do then, if anything? A. I don't know. I don't think I did anything. I might have called Detective Sergeant Greco to inform him, but I don't recall.

Q. At least you indicate you did nothing; is that correct? A. I didn't do anything on the case; no, sir.

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Q. What did you do the next day, which would be May 1st, '56? A. I stayed home.

Q. You stayed home. So you did nothing on May 1st, as far as this man's incarceration in Chicago is concerned? A. Everything was being handled by Detective Greco at that time.

Q. What did Detective Greco do, if you know? A. I think that he—

Q. I said, "If you know." A. —made arrangements for us to leave for Chicago.

Q. When? A. Wednesday morning.

Q. That was May 2nd? A. Yes.

Q. The man was under arrest then, for almost
47 three days, wasn't he? A. Not to my knowledge at that time.

Q. Did you learn later that he was arrested on April 29? A. I learned later that he was arrested on Sunday. Yes.

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Q. You left for Chicago on what date, May— A. 2nd would be a Wednesday.

Q. What time did you leave the District for Chicago? A. Around eight o'clock in the morning. I don't know the exact time.

Q. Were you equipped with any arrest warrant at that time? A. No, sir.

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Q. Officer, you arrived in Chicago on what date? A. On Wednesday.

Q. At what time? A. I think it was around 11:00 or 11:30 or 12:00 o'clock. I am not positive as to the correct exact minute.

Q. Do you know prior to your going to Chicago that the detective Greco had gone before the United States Commissioner and swore out a complaint and on the basis of that sworn statement an arrest warrant was issued by the United States Commissioner of this jurisdiction? A. I don't know, or I don't recall that. He might have told me. Maybe he did or maybe he didn't. I don't recall.

Mr. Carey: At this point I would like to offer in evidence a sworn complaint which is part of the criminal file in this case which is dated May 1st, and sworn to by Detective Greco of the Washington police force.

I should like to offer in evidence at this point the arrest warrant issued by the Commissioner on the same date, May 1st, which was issued on the basis of the sworn complaint. The complaint is dated 10:00 a.m., May 1st, '56, sworn to by Detective Sergeant Salvatore J. Greco. The arrest warrant was issued on May 1st, 1956.

I should also like to have the Court be apprised of the fact that the arrest warrant was executed in the District of Columbia on May 1st, 1956, at 10:00 a.m., by Oscar
48 Strine, a deputy United States marshal for the marshal for the District of Columbia.

I would like to offer that in evidence.

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By Mr. Carey:

Q. Can you answer my question now, did Detective Sergeant Greco, or did you when you left for Chicago on May 2, 1956, have the arrest warrant issued by the United States Commissioner for the District of Columbia with you? A. No, sir, we did not.

Q. Why didn't you or Officer Greco take that arrest warrant with you, issued by the Commissioner? A. I don't believe the Commissioner would have given it to us.

Q. That is correct. You have no authority to execute that warrant, isn't that correct? A. That is right.

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Q. Had the arrest warrant issued by the Commissioner in this District been sent to Chicago and executed by a United States deputy marshal in Chicago, that you then wouldn't have the right to interrogate or examine this defendant in Chicago? A. We wouldn't have had custody of him, yes.

Q. That is correct. Was there any purpose in either you or Sergeant Greco not having a United States marshal execute this warrant? A. All I know is that it is the practice—

Q. I am asking on this particular case, Officer. What was your purpose in not having that arrest warrant executed in Chicago by a deputy United States marshal? A. We wanted to talk to the Hodges boy

Q. That' correct. You wanted to talk to him. And you achieved what you wanted to talk to him about, did you not? A. Yes, sir.

Q. You got a confession? A. Yes, sir.

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Q. What was your purpose in sending out the police court warrants to Chicago? A. We already had
49 warrants which had been sent to Tampa. So we also got police court warrants, sent them to Chicago, inasmuch as, you can see, we wanted to talk to Hodges and we knew that if Commissioner's warrants were served we would not be able to talk to them until they got back here in Washington.

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Q. Were you present when this man had the extradition hearing in Chicago? A. No, sir.

Q. Was he ever advised of his constitutional rights, to your personal knowledge? A. No, sir.

Q. Did you ever advise him of his constitutional rights to remain quiet when being interrogated by the police? A. Yes, sir.

Q. When? A. When I took the statement from him.

Q. When was that? A. I guess it was around 3:30 or something like that on Wednesday afternoon. I don't know the exact time.

Q. Why was this man not arraigned on May 3rd, 1956, when you arrived back in the District of Columbia? A. I don't believe there were any courts in session.

Q. There are approximately 57 Judges in this District. Are you aware of that? A. Yes, sir.

Q. Are you aware that any one of the 57 Judges can have an arraignment? A. Yes.

Q. Did you make any effort to get in touch with any of the 57 Judges in this District? A. No, sir.

Q. So you held him in jail one more night, is that correct? A. Yes, sir.

Q. He was arraigned the following day, is that correct? A. The following morning.

Q. May 4th, '56. A. Yes, sir.

Q. About 10:00 o'clock in the morning. A. About what time?

Q. He was arrested April 29, 1956 and arraigned May 4. That is a period of approximately six days, is it not? A. To my knowledge, the first time that I knew he was arrested was on Monday, I guess; April 30. I believe.

50 Q. You don't question that he was arrested on April 29th, do you? A. No, I don't deny that.

Q. Did you ever tell this defendant Hodges that he was entitled to be represented by counsel before he made any statement? A. No.

. . . . . .

Q. Did you make any attempt to secure other means of transportation other than airplane? A. If I recall correctly, we talked to both brothers, told them we have

return tickets by air and asked them if they wanted to fly back. They agreed.

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Q. I think you said that you were off on what date? A. My days off are Tuesday and Wednesday.

Q. That was May first. Was this delay going to Chicago occasioned by the fact that you were not working on May first? A. No, sir.

Q. What caused the delay? A. I believe because we did not know whether they would return of their own volition.

Q. What? A. We did not know whether the two boys would return voluntarily or not. Did not learn that until Tuesday. We found out they were locked up on Monday.

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Recross Examination

By Mr. Carey:

Q. In orderto talk to a prisoner in the custody of the United States Marshal you first must have the—secure permission from the United States Marshal, isn't that correct? A. Yes, sir.

Q. So if you wanted to talk to this man in Chicago, if this man had been served or had a warrant of arrest executed by a Deputy United States Marshal, you first would have had to secure clearance from the United States Marshal in Cook County or the Federal District in Chicago, isn't that correct? A. Yes, sir.

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Redirect Examination

51 By Mr. McLaughlin:

Q. Had you any information that that United States Marshal in Cook County wouldn't let you talk to this defendant prior to going out there? A. No, we did not.

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Mr. McLaughlin: That is the government's case, Your Honor.

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CHARLOTTE RHEA HODGES

was called as a witness by the defendant * * *

Direct Examination

By Mr. Carey:

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Q. Are you the wife of the defendant John Hodges? A. I am.

Q. Were you his wife on April 29, '56? A. I was.

Q. Directing your attention to that particular date, can you tell us where you were on April 29, '56, about 6:00 o'clock in the evening? A. In Chicago.

Q. Where in Chicago? A. 4135 Greenview Avenue.

Q. Keep your voice up. Don't be afraid. Everybody has to hear what you say. A. 4135 Greenview Avenue.

Q. What type of establishment were you living in at that time, at the address you just gave? A. A rooming house.

Q. Who was living there with you on that date? A. My husband and his little girl.

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Q. Tell us what happened. A. It was Sunday evening and we were home and three men came to the door. I was walking up from the kitchen and as I was half-way up the hall one of these men asked me was I living in that room. Two of them were already in the room and one was standing at the door.

They motioned me inside. They were standing there and they had guns and everything?

Q. Did three of them have guns? A. Two of them had guns out.

52 Q. Who were the two that had guns, if you know?

A. All I know, one was a short one. I don't know the names of any of them.

Q. Where did they have these guns, the two that you mentioned? A. In their hands.

Q. Were they pointing them at anybody? A. Standing there just with their guns out.

Q. Do you know of your own knowledge how these men got into your room at this address? A. They just walked in on him.

Q. Was the dor locked or unlocked, if you know? A. I think the door was unlocked. We kept it locked, you know, at different times when I went back to the kitchen—in fact I think it was just open about that much because when I used to walk back to the kitchen, back and forth, I did not lock the door.

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Q. Do you know how they got into the room? A. No. As far as I know they walked in.

Q. You were not there at that particular time? A. No, I wasn't right there.

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Q. Did you hear them ask your husband anything about a robbery in the District of Columbia? A. No, sir, they told me that they were there in reference to his car. They took his registration. He handed his wallet. They took his registration and I couldn't understand what it would be in reference to the car for. I kept saying to them that the registration had his name and everything on it. How could—they said something about it not agreeing with his license and I couldn't understand because I kept saying it had his full name and everything on it, how could it be a different registration, and they kept saying, "Well, we are just going to take him in. This is just pertaining to his car."

I was trying, of course, to get information out of them and they said, oh, he would probably be back in two or three hours, they were sure they could clear it up
53 right away. It just had something to do with his car, and eventually he left and three more men came and sat in my apartment, two of them — one of them at the window of my partment, one of them at the window of the door and another one sitting on the step and sat there all night long and they wouldn't tell me where they had taken him at all.

And so finally—and I was quite nervous and upset and I kept begging them to tell me where he was being taken and they still would not let me have any idea and so one of them—I guess out of the kindness of his heart—slipped a piece of paper with a telephone number on it in my pocket and told me not to let any of the others know he

had done that but that was where Jack was taken, for me to call there in the morning and I called there for three days and still couldn't get anything.

Q. Whom were you calling? Do you know? A. Some police precinct, I think.

Q. How many times did you call during that three-day period to get information about your husband? A. Numerous times.

Q. Can you estimate? A. Approximately five times a day.

Q. That would be approximately 15 times, is that correct? A. Yes, sir, if not more.

Q. When did you learn where your husband was? A. Wednesday, very late in the afternoon.

Q. Wednesday. Would that be May 1st or 2nd? A. Second.

Q. What time of day was it that you learned your husband was in the Chicago jail? A. Around 4:30 or 5:00.

Q. Did you on that day see your husband at that time? A. No, I did not.

Q. Did you ask permission to see him that day? A. Yes.

Q. What were you told, if anything? A. That he was going to be extradited and that there would be no sense in me coming down.

Q. When did you next see your husband? A. The day that he arrived in Washington, Friday.

Q. Did you come to Washington? A. Yes, I left after I had called there Wednesday.

54 Q. Who told you that your husband was going to Washington and you could see him there? A. Some gentleman over the telephone.

Q. When was it that you learned that? What day? A. That was when I finally got through to the person.

Q. May second? A. Yes.

Q. At any time did you ask permission to have your husband represented by a lawyer while he was in the custody of the Chicago police? A. I wanted to get legal aid because at the time I was without funds but I didn't know anything about going about it and I tried and I was informed that it would be best for me to get my legal aid in Washington because he was going to be extradited.

Q. How did you try to secure legal aid in Chicago? A. Looked it up and tried to call but I couldn't get anything.

Mr. Carey: You may inquire.

Cross Examination

By Mr. McLaughlin:

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Q. How many times were you in Chicago? A. Once.

Q. When was that? A. At the time that he was picked up. We had been there—

Q. Do you know what time that was? A. —a few weeks. I had been there two and a half weeks.

Q. What was your occasion for being in Chicago for two and a half weeks? A. Beg your pardon?

Q. I say, why were you in Chicago at that time for the two and a half weeks? A. Because the work was better for my husband.

Q. What work? A. He is a roofer and the work for the summer months in Chicago is very good because it pays very well.

Q. He worked as a roofer before going to Chicago? A. Yes, he did.

Q. Who had he worked as a roofer for before going to Chicago? A. In Florida.

Q. When was he in Florida? A. Just before we went to Chicago.

55 Q. How long did you remain in Florida? A. About two months, approximately.

Q. When did you leave Washington for Florida? A. February.

Q. What? A. February.

Q. February of what year? A. 1956.

Q. Prior to leaving for Florida at that time was your husband working? A. Prior to leaving Florida?

Q. For Florida? A. No.

Q. How long had he been out of work? A. About a month.

Q. In July of 1955 where was your husband working, if you know? A. I don't know.

Q. What? A. I don't know.

Q. Do you know whether or not he was working on or about July 30 of 1955? A. Yes. I think he was.

Q. Where was he working? A. I have no idea.

Q. What?

Mr. Carey: If you know.

The Witness: Bergmann's Laundry, I think.

By Mr. McLaughlin:

Q. Was he a roofer at Bergmann's Laundry? A. No, sir.

Q. So he did do other work besides a roofer, is that right? A. Yes, sir.

Q. When you went to Florida from Washington, who went with you? A. Who went with me?

Q. Yes, ma'am. A. I flew down and met my husband in Florida.

Q. You flew down. Do you know how your husband got down there? A. Ye , sir.

Q. How? A. In his automobile.

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Q. What time had you arrived at the apartment on that date? A. We lived there two weeks before.

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56 Q. At the time the police started to search the place, did they—you knew at that time they were policemen, did you not? A. Yes.

Q. Did they tell you what they were searching for? A. A gun.

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Redirect Examination

By Mr. Carey:

Q. Did you know your husband in July 1955 when this robbery allegedly took place? A. No, sir, I did not.

Q. You were single at that time, were you not? A. Yes, sir.

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April 11, 1957

(The jury was not in the courtroom when the following proceedings occurred:)

JOHN E. HODGES

Direct Examination

By Mr. Carey:

* * * * * * * * * * *

Q. I direct your attention, Mr. Hodges, to April 29, 1956. Will you tell the Court where you were on that particular day? A. I was in my apartment of 3147 Greenview Avenue, Chicago, Illinois.

Q. Who was with you in the apartment on that day? A. My wife and my little girl.

Q. How old is your little girl? A. At that time she was four years old.

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Q. Did there come a time on April 29, 1956, when you were accosted by the Chicago police? A. Yes, sir.

Q. What time of day was it that you first saw the Chicago police on those premises in Chicago? A. As far as I can remember it was between 6:00 and 6:30—around 6:30.

Q. Where were you at the time that you first saw any of the Chicago policemen? A. I was in my living room listening to the radio with my little girl.

57 Q. What, if anything, did they say to you and what did you say to them when you first saw them? A. When I first saw them I didn't know who they were, I asked, what's this all about?

Q. Were these men in uniform or were they not? A. No, sir.

Q. You said, "What's this all about?" What, if anything, did they say to you? A. They says, "You are coming with us."

Q. What did you say to that, if anything? A. I said, "What do you mean?"

They said, "Well, we are police officers."

Q. Did they identify themselves at that time? A. Yes, sir, because I told them, "I don't know if you are police

officers or not," and one of the officers pulled out a badge and showed me their badges.

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Q. Did you invite them into your premises at any time? A. No, they was in before I knew anything about it.

Q. Answer my question, please. Did you invite them into the premises? A. No, sir.

Q. Did you give them permission to enter the premises? A. No, sir.

Q. Do you know of your own knowledge whether your wife invited them or gave them permission to come onto those premises? A. No, I don't know if she gave them permission.

Q. I can't hear you. A. I don't know if she gave them permission. I am pretty sure she didn't though.

Q. What time of day was this? A. Approximately 6:30—between 6:00 and 6:30.

Q. When were you taken from these premises and placed under arrest? A. Close to 6:30.

Q. Where were you taken at that time? A. I was taken to police precinct—I believe it is Sheffield or Shepherd, something like that, the closest precinct to my home.

Q. What, if anything, did the police do to you at that precinct when you were taken there? A. They just
58 took me there and held me there and went out looking for my brother and my stepfather.

Q. How long did you stay at this precinct on Sunday, April 29? A. I imagine about 20 minutes.

Q. What happened after the 20 minutes? A. They came back and took me to, I believe it is headquarters.

Q. Where are headquarters located, if you know? A. It's right in the middle of town.

Q. In the middle of the town? A. Yes, sir.

Q. About what time was it that you arrived in headquarters, that is, the Chicago police? A. A little after 7:00.

Q. What was done to you, if anything, while you were in the main police headquarters? A. They took me to the cell block and asked me some quetsions about the robbery.

Q. About what robbery? A. Briggs Meat Company robbery.

Q. What was your reply to their questioning about the robbery? A. That I knew nothing of the robbery.

Q. How long did they question you at the main police headquarters? A. Around half an hour, twenty to a half-hour.

Q. About what time of day was it that they finished interrogating you at that time? A. Approximately 8:00 o'clock.

Q. Then what happened after that when they left at 8:00 o'clock? A. Taken to a line-up.

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Q. What time of day or evening was it when you were taken in this line-up? A. About 9:00 o'clock.

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Q. How long were you held in this line-up? A. About 10 minutes, 15 minutes.

Q. After the completion of your being in the line-up where were you taken then? A. Back to the cell block.

Q. About what time of the evening was it then that you were taken to your cell block? A. I imagine about 9:30.

Q. What happened after that, if anything? A.
59 Back there I went to sleep and they woke us up about —woke me up about 2:30 in the morning for another line-up.

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Q. How long—when did you leave the line-up? A. About a quarter to three, something around that time, 10 minutes to three.

Q. At a quarter of three where were you taken? A. Back to the cell block.

Q. When again were you interrogated by the police after being taken back to the cell block at 2:45 in the morning? A. In the morning, about 8:30 or 9:00 o'clock.

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Q. Where were you taken, if you know? A. No, sir. I can't tell exactly where I was taken in the building. I was taken downstairs to another room.

Q. Were there any other people in this room where you were taken two floors downstairs? A. Just some detectives.

Q. How many detectives were there? A. Three.

Q. What, if any, questioning did they ask of you at that time? A. They kept asking me questions about this Briggs robbery.

Q. What did you say when they asked you about this Briggs robbery? A. I kept telling them I didn't know anything about the Briggs robbery.

Q. Did you admit any participation in the Briggs robbery at that time? A. No, sir.

Q. And how long were you kept in this room downstairs at 8:30? How long were you kept in this room downstairs with the detectives? A. About a half an hour, maybe 45 minutes. I had no way of telling the certain time.

Q. Liable to be about 9:00 or 9:15 in the morning, is that correct, of April 30? A. Yes.

Q. What happened after that, if anything? A. They took me back to my cell block.

Q. How long did you stay in your cell block, Mr. Hodges? A. I had no sooner got to the cell block than I went to another line-up.

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Q. Where did this line-up occur? A. The same place as the others.

Q. How long were you in the line-up? A. About 10 or 15 minutes.

Q. What time of day was it when you entered the line-up and what time of day was it when you finished in the line-up, to the best of your ability to recall? A. About 10:00 o'clock to about 10:15.

Q. Were you questioned while you were in this third line-up? A. No, sir.

Q. Were the lights on? A. Yes, sir.

Q. At the completion of the line-up, what happened then? A. I went back to my cell-block—I was escorted back to my cell block.

Q. About what time of day was that, would you say? A. It was right after the line-up—about 10:30 approximately.

Q. You arrived at your cell block at 10:30 o'clock in the morning. Were you questioned by the police at all, while you were in the cell block at 10:30 in the morning? A. Yes, sir, they came up in the evening, I don't know exactly what time, and told me why didn't I just tell them, it really

wasn't their trouble, it would just save me a lot of trouble when I got back to Washington.

Q. What time of day was that? Estimate as best you can. A. Around 2:00 o'clock.

Q. How many police questioned you in your cell block? A. It was two of them.

Q. Did you admit any participation in the Briggs robbery at that time? A. No, sir.

Q. When were you again taken from your cell block or again when were you interrogated by the police after 2:30 o'clock in the afternoon of April 30? A. I believe it was the following morning I was interrogated again.

Q. What time of the morning was it? Can you
61 estimate it? A. About 8:30.

Q. Where were you interrogated? A. They took me back downstairs again.

Q. Down to the detectives' room to which you referred earlier? A. Yes, sir.

Q. What time of day was it, would you say? A. About 8:30.

Q. How many police were present at that particular time? A. Three.

Q. Are you able to identify any of the three? A. Oh, yes, if I seen them I could, yes, sir.

Q. How long were you questioned by the police in your second trip to the detectives' room.? A. About a half-hour, 45 minutes, approximately.

Q. That is May 1st, is it not? A. Yes, sir—morning of May 1st.

Q. What time was it that you left the detectives' room to go elsewhere? A. 9:00 or shortly after.

Q. Where did you go? A. Back up to the cell block.

Q. When did you again leave the cell block on May first, 1956? A. I believe it was on the first when they took me over to Cook County Jail.

Q. What is the distance, if you know, between the police department where you were being confined and the Cook County Jail? A. Just an approximate guess I imagine it must be about, about around 8 miles, I imagine.

Q. How did you go to Cook County Jail on May first? A. By automobile.

Q. Who accompanied you at that time? A. Two officers.

Q. Were you questioned or interrogated while you were making this 8-mile trip between police headquarters and Cook County Jail? A. They told me if I knew anything about it it would be best to tell them so it would be easier on me when I got back to Washington. The same thing they told me before.

62 Q. What was your reply? A. I told them I didn't have anything to do with it.

Q. What did they do with you if anything, over at Cook County Jail? A. I signed extradition papers over there.

Q. What time of day was that? A. It seems to me like it was around 1:30.

Q. On May first? A. Yes.

Q. That is the afternoon? A. Yes, sir.

Q. At any time between your arrest about 6:30 on Sunday evening April 29 and your being brought before—or when you signed this extradition paper, were you advised by the Chicago police that you were entitled to be represented by a lawyer or that you had certain constitutional rights? A. No, sir.

Q. Were you ever advised that you had no right or you had no obligation to incriminate yourself under the Constitution of the United States? A. No, sir.

Q. Did you ever discuss the Fifth Amendment with these police officers or detectives? A. I didn't discuss anything. I didn't know anything about law any way, whatsoever.

Q. Did they ever suggest to you that you would be able to contact your wife or contact a lawyer during this time that you were confined and in the custody of the Chicago police? A. I have tried to get permission to contact my wife but I could never get permission to do that.

Q. Whom did you ask? A. The officer in charge of the cell block up there.

Q. What was his reply to your request for permission to talk to your wife? A. No calls are made going out.

Q. What? A. No calls are to be made going out.

Q. Did you ever ask the Chicago police to have a lawyer, or allow you permission to get in touch with a lawyer? A. No, sir.

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Q. When you signed this extradition paper, was
63 it before a judge in Chicago? A. Yes, sir.

Q. Was it a federal judge or a state judge or a county judge? The marshal told me it was the federal judge, Chief Justice, he said.

Q. Did you learn later that that was correct or incorrect? A. No, I never found any difference, no, sir.

Q. Did you learn yesterday from the testimony of Officer—Detective Fitzgerald, that you were not before a federal magistrate but instead you were before a county magistrate or chief magistrate of Cook County, Chicago, Illinois? Did you hear that testimony here yesterday? A. I was under the opinion that he said it was a federal judge.

Q. Yesterday? A. Yes, sir.

Q. Let me refresh your recollection and ask if he didn't suggest it was Chief Judge Hochkins or Hodgkins? A. I don't recall the name, sir.

Q. I show you, Mr. Hodges, Government Exhibit No. 1, and ask if that is your signature on that particular exhibit. A. Yes, sir.

Q. Will you read the first part of that so we can identify with particularity the judge before whom you appeared in Chicago at the time you signed this extradition paper? A. I, John E. Hodges, now in the custody of the Sheriff of Cook County, Illinois, has been produced by the said Sheriff before the Chief Justice of the Criminal Court to hereby certify that I freely and voluntarily agree to accompany messenger to—that is blank.

Q. Is that the man before whom you appeared at the time you signed this waiver?

Is this the paper you signed at the time you were before that judge to which you referred earlier? A. I don't recall what the paper looks like but that is my writing.

The Court: Excuse me, Mr. Carey Will you read into the record at this point that entire exhibit so that I can have the benefit of what it says in its entirety?

Mr. Carey: Sheriff's Office of Cook County,
64 Illinois, Criminal Court Building, 26th Street and California Avenue, Chicago 8, Illinois. May 1, 1956.

John E. Hodges, now in the custody of the Sheriff of Cook County, Illinois, and having been produced by the said Sheriff before the Chief Justice of the Criminal Court, do hereby certify that I freely and voluntarily agree to

accompany messenger to—in the state of Washington, D. C., for the purpose of answering to the charge of armed robbery there pending against me. Furthermore, I hereby waive all formality and am willing to return to the state of Washington, D. C., with the said messenger with or without the governor's requisition or other papers legally necessary in such cases and exonerate Joseph D. Lohman, Sheriff of Cook County and all other officers of said department from any blame, compulsion or interference in this connection. John E. Hodges, Signature. Chicago, Illinois, May 1, 1956. I hereby certify that the above agreement was signed in the presence of each of the undersigned and it was made without any compulsion of any kind whatsoever on the free desire of John E. Hodges.

There is a signature, Your Honor, I think it is Wilke, Your Honor, under seal.

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Q. Mr. Hodges, when you were before this magistrate, this state magistrate or county magistrate in Chicago, did that magistrate or anybody in that courtroom, either police, bailiffs, clerks or otherwise, advise you of your constitutional rights? A. I can't remember if he did advise me or not. I don't remember if he did.

Q. Were you ever advised at this proceeding before this magistrate that you were entitled to be represented by counsel? A. No, sir.

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Q. At the completion of this proceeding where were you taken? A. To a cell block in Cook County Jail.

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Q. Were you interrogated by the police or by any-
65 one during the time you were confined in this cell block in the Cook County Jail? A. No, sir.

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Q. Government Exhibit No. 2 is a confession allegedly signed by you. Before you made this confession to Sergeant Greco and Wilson were you advised by either of those Washington detectives that you were entitled to be represented by a lawyer? A. No, sir.

Q. After this confession was signed by you what was

done to you then? A. Taken back to the cell block at police headquarters.

Q. Not to Cook County Jail? A. No, sir.

Q. What time of day was it when you were taken back to the cell block in Cook County Jail? A. Between 1:30 and 2:00 o'clock.

Q. I mean police headquarters. A. Between 1:30 and 2:00 o'clock.

Q. When again did you have any conversation with police officers in Chicago after you were brought back to police headquarters the afternoon of May 2? A. Well, it was May the 3rd, was the next time I had an opportunity to talk to them. They was the Washington police.

Q. What time of day was that? A. I believe it was about 12:00 o'clock.

Q. Were you confined in the police headquarters at the time you signed this alleged confession until you again saw the police the following day? A. Police headquarters? Yes, sir.

Q. Were you interrogated by the Chicago police during the time you were in the police headquarters between May 1st and May 2nd? A. No, sir.

Q. What conversation, if any, did you have with Mr. Greco and Mr. Wilson when they again saw you the following afternoon? A. They just told us that we was going to take a plane back to Washington. They had asked us if we wanted to take the plane.

Q. Did you agree to that? A. Yes, sir.

Q. When did you return to Washington, Mr.
66 Hodges? A. I believe it was right about 4:00 o'clock.

Q. What date was that? * * * A. May 3rd.

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Q. Did you arrive in Washington on the afternoon of May 3 about 4:00 o'clock? A. Yes, sir.

Q. Where were you taken then? A. Police headquarters here in Washington.

Q. Were you quizzed or interrogated by the police at police headquarters? A. No, sir—fingerprinted.

Q. Were you ever confronted by Mr. Parks of the Briggs Company in police headquarters? A. Yes, sir.

Q. What time of day was that?—A. It could have been about 4:30, quarter to five.

Q. What was the conversation, if any, that transpired between the police and you when Mr. Parks was present in police headquarters in Washington May 3, in Washington, about 4:30 or 5:00 o'clock? A. With Mr. Parks.?

Q. Yes. A. Mr. Parks was in police headquarters in the robbery squad when Sergeant Wilson and Sergeant Greco brought us in and Sergeant Greco said, "Well, here is the boys that robbed Briggs," and asked if he recognized us.

Q. What did Mr. Parks say, if anything, at that time? A. Mr. Parks said I used to work for him, that he knew me.

Q. Did he indentify you as having participated in the robbery? A. No, sir.

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Q. How long did this take? A. About a half an hour.

Q. What time did it conclude? A. Around 5:30.

Q. Where were you taken then? A. To be fingerprinted and have our pictures taken.

Q. Where were your pictures taken? A. Right in the Municipal Building, police headquarters.

67 Q. How long did that take? A. I imagine it took about, approximately half an hour.

Q. What else besides having your picture taken occurred? A. Was fingerprinted and taken down to, I guess what they'd call cell block at headquarters.

Q. What time was it when you were taken to the cell block in police headquarters? A. Between 5:30 and 6:00.

Q. How long did you stay there? A. Until the following morning.

Q. Then what happened? A. Then went to, I believe, the Commissioner to be arraigned.

Q. What was the date, before, you were taken before the U.S. Commissioner? A. May the 4th.

Q. What time of day was it? A. Approximately 9:30, 10:00 o'clock.

Q. I show you, Mr. Hodges, a paper in the Court record which I shall ask the Court to take judicial notice of, which is identified as a record of proceedings in criminal cases. I ask you if this is correct, and I shall read it to you.

Proceedings taken. Complaint prepared. Defendant was informed of the complaint and of his right to have a preliminary hearing and to retain counsel. Defendant

was not required to make a statement and was advised that any statement made by him may be used against him. Defendant was advised of his right to cross-examine witnesses against him and to introduce evidence in his own behalf.

Was that the first time that you were advised of your right to be represented by counsel by any judicial officer? A. Yes, sir.

Q. Subsequently you were represented by counsel, were you not, at a later period? A. At a later period, yes, sir.

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Q. You were arrested on April 29, 1956, between 6:00 and 7:00 o'clock in the evening. You were arraigned
68 before a U.S. Commissioner here in the District of Columbia on May 4, 1956, at about 10:00 o'clock in the morning. That is the first time, between that 6-day period, in which you were advised that you were entitled to be represented by an attorney? A. Yes, sir.

Q. It is the first time any judicial officer advised you that you could not be compelled to testify against yourself, is that correct? A. Yes, sir.

Q. Prior to that time were you aware of your constitutional rights under the Fifth Amendment to the Constitution? A. I wasn't aware of any rights.

Q. Prior to that time, May 4, 1956, were you aware of the fact that you were entitled to be represented by a lawyer? A. I imagine I was aware of it. I just didn't think of it.

Q. Mr. Hodges, I direct your attention to the evening of April 29, 1956, when the Chicago police arrived, you first saw them, did you see any guns at all at that time? A. Yes, sir, I seen two guns pointing straight at me.

Q. Who pointed those guns at you? A. Two of the officers.

Q. What, if anything, did the police say to you that had these guns drawn? A. They wanted,—they were going to take me to headquarters to ask me some questions about the Briggs robbery in Washington, D. C.

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Q. Mr. Hodges, were you frightened during the time that you were arrested? A. I was at first when I seen the guns pointing at me.

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Cross Examination

By Mr. McLaughlin:

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Q. You had two guns in that room in that suitcase, did you not? A. Yes, sir.

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Q. You had bullets, that is, slugs, in that suitcase, too, is that right? A. Yes, sir.

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Q. When the officers came in, how many officers came in your room? A. Two officers.

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Q. What did they say about the robbery? A. That it happened in Washington, D. C., and that I was wanted.

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Q. What discussion did you have with Officer Fitzgerald in your room about the Washington robbery? A. They just going to take me down to question me about it.

Q. Was anything else said at that time? A. Yes, they said they had a warrant for my arrest but they didn't show any warrant for my arrest.

Q. Warrant for your arrest for what? A. Robbery.

Q. You knew when they took you out of that room, did you not, that they were arresting you for a robbery in Washington here? A. I didn't know what they was arresting me for. They said my car and then they did mention something about the robbery, so I didn't know which was what.

Q. You were in Washington about July 30 of 1955, were you not? A. Yes, I was.

Q. You had worked at Briggs some time prior to that, had you not? A. Yes, sir.

Q. Didn't you read in the newspapers on or about that time that Briggs was robbed? A. Yes, sir.

Q. So that when these police talked to you in Chicago on April 29 and told you that you were being arrested for the Briggs robbery you knew there had been a robbery, did you not? A. Yes, that's right.

Q. Did you ask them any questions as to why they were arresting you or what evidence they had against you? A. They said they had a warrant for my arrest.

Q. So at that time you knew that you were being
70 arrested for a robbery here in Washington? A. That's right.

Q. When they brought you down to police headquarters how many guns did they take out of your room? A. One gun.

Q. When you arrived in Washington, did your brother arrive with you? A. Arrived in Washington?

Q. Or, Chicago, rather—Frank? A. When we first got to Chicago?

Q. Yes. A. Yes, sir.

Q. Did your brother Frank also carry a gun? A. No, sir, my brother doesn't have any permit or anything to carry a gun, doesn't even have a gun.

Q. Do you know whether or not in Chicago any guns were recovered from him? A. Yes, sir, a gun was recovered from him.

Q. When the police brought you down to police headquarters did they fingerprint you, in Chicago? A. About six times.

Q. On the night of April 29, 1956, did they fingerprint you when they brought you down? A. Yes, sir.

Q. Did they put you in a line-up that night? A. Yes, sir.

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Q. I say, when the police, that is, the Chicago police, put you in the line-up on April 29, it was for the purpose to see if you could be identified for any local crimes, that is, Chicago crimes, isn't that right? A. I believe so.

Q. When they brought you to police headquarters on April 29th, did you see your brother Frank there? A. No, sir.

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Q. You say that the Chicago police questioned you about the Briggs robbery here in Washington, is that right? A. Yes, sir.

Q. Did you ever make any admissions to them? A. No, sir.

Q. That you had committed that robbery? A. No, sir, I had no admissions to commit. [Sic]

Q. My question is, you made no admissions to them? A. No, sir.

71 Q. The police of Chicago, that you had committed the Briggs robbery, is that right? A. That's right.

Q. These police that talked to you, what did they—how did they question you about the Briggs robbery? What did they say to you? A. They was trying to put words in my mouth, trying to make me say I said—

Q. Tell me what they said to you. A. I don't recall the words they said to me.

Q. What do you mean when you say they tried to put words in your mouth? What words did they try to put in your mouth? A. That I did it.

Q. Is that all they said, you did it? A. No, they did more than that.

Q. Tell us what they said. Tell us the words that they put in your mouth. A. They said, "You know that you did it. You better come out with it, just as well tell us so it will be cleared up now and it will save you a lot of hard time when you get back to Washington, D. C. They were stressing that point very, very much.

Q. Is that all they said to you? A. No, they said other words, all come in together with—

Q. What were the other words? Now, tell what they said to you. A. I don't remember the words. They were trying to get a confession out of me. That's all I know.

Q. Is that all they said, that you better tell what happened? A. No, that's not all they said.

Q. What did they say? Tell me everything they said to you, trying to put words in your mouth. A. They wanted to know—they said they knew I did it, to name who was with me, come clean, it would be easier on me when I got back to Washington, D. C. They had my stepfather there. He was supposed to be in it. They was going to let him be the ring leader. Of course they had to release him, I

think, the next day, because they didn't have no warrant for him. They had him there too.

72 They tried to put the blame on my brother, my stepfather and me.

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Q. When did you tell the Chicago police that you would come back to Washington voluntarily? A. When did I tell the Washington police?

Q. No, the Chicago police. A. It was on May first.

Q. Had you told the Chicago police at any time prior to May first that you would come back to Washington voluntarily? A. Told them the first day they picked us up if I had to go there to clear myself I would go to Washington to clear myself.

Q. So you say you told them on April 29th that you would come back voluntarily, is that right? A. That's right.

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Q. All right, from the time—that is, from April 29th up until May 1st when you appeared before this Chief Judge out there, these different line-ups that you were put in, they were for the purpose of identifying you in local Chicago crimes, isn't that right? A. I imagine so, yes, sir.

Q. No witnesses from Washington were ever brought to identify you for the Briggs crime, were there? A. No, sir.

Q. When you were in these line-ups were there any questions asked you, asked of you? A. Not a word was spoken to me, no, sir.

Q. In other words, you and four or five more just walked out in the line and stood there, isn't that right? A. That's right.

Q. When my friend says the lights—those lights in that line-up, as you came out, those lights weren't flashed right on you, were they? A. You mean in the face?

Q. Yes. A. No, sir.

Q. In other words, as you walked out in the line-up it wasn't any brighter than this room right here, isn't that right? A. No, it was a slight bit brighter than that. It is the same as it is in the Washington, D. C., line-up the lights.

73 Q. Those lights are not flashed right on you, they are not like television—they are not for torture or anything like that? You are not inferring that, are you? A. No, sir, I am not. It is not torture.

Q. On May 1st you were brought before this judge, isn't that right? A. Yes, in Chicago.

Q. When you were brought before him you knew why you were being brought before him, did you not? A. Yes, sir.

Q. At the time that you wre brought before him did the judge ask you any questions? A. Yes, sir.

Q. Did the judge tell you at that time that you didn't have to go back to Washington if you didn't want to? A. Oh, yes, sir.

Q. He told you at that time, did he not, that if you did not go back voluntarily the District of Columbia would have to extradite you? A. He told me that I didn't have to sign the extradition papers, and if I didn't want to come back he says that they cannot take me back. I told him I want to get back, I wanted to clear my name, I said, "I have a family, I want to get back there and clear my name so I can go back to work."

Q. No one, either the Chicago police or the Washington police, made any attempt to force you back to Washington, is that right? A. No, they didn't force me, no, sir.

Q. So anything pertaining to coming back to Washington was done voluntarily on your part? A. Yes, sir.

Q. I believe Government Exhibit 1 was signed by you and signed voluntarily, is that right? A. That's my handwriting, yes, sir.

Q. When you say that is your handwriting, didn't you sign that waiver? A. I signed a waiver, yes, sir.

Q. You knew what you were signing at that time, did you not? A. To the best of my knowledge at that time, yes, sir, it was to extradite me back to Washington, D. C., and they had my permission.

Q. Up until the time, which was on May 2, I believe, when you first saw Officer Greco and Officer Wilson— A. May 2nd, yes, sir.

74 Q. —had you made any confession or any admissions to any of the local Chicago police of the crime of robbing Briggs? A. No, sir, but they tried to get some out of me.

Q. What? A. No, sir, I made no confession.

Q. What do you men they tried to get something out? A. They seemed to want to have something to hand to the Washington police when they got there.

Q. Tell us what they tried to do to do that? A. Tried to get a confession out of me.

Q. What did they say or do to you to get the confession? A. Roughed me up a little bit.

Q. How? A. With their hands.

Q. How did they rough you up? A. Hit you.

The Court: What did they do?

The Witness: Hit me.

The Court: How did they hit you? Tell us about that.

The Witness: Hit me in the stomach, slapped me on the back of the neck, and the side of the head.

By Mr. McLaughlin:

Q. When did they do that? A. They did that on three different occasions.

• • • • • • • • • •

Q. All right. Did Officer Fitzgerald, here, ever lay a hand on you? A. No, sir.

Q. When Officer Greco and Officer Wilson came to see you that was about what time on May 2? A. It was about 1:00 o'clock, approximately 1:00.

Q. Where were you at that time? A. I was in the—they brought me from Cook County Jail to Detective Headquarters, Detective Officer.

Q. What happened when you saw Officer Greco and Officer Wilson? A. They took me in a little room right off the headquarters room, a little room on the side.

Q. What did they say to you? A. They said that
75 they had warrants for my arrest in Washington, D. C., for the robbery of Briggs Meat Company.

Q. What else did they say to you? A. They asked me if I did it. I told them no, I did not do it.

Q. What else was said at that time, either by you or the police? A. They said that they knew I did it, just wanted me to sign a confession saying I did. I told them I didn't do it and I wasn't going to sign any confession. They said, "We got a confession here from Straymer," and asked me if I knew Straymer and I told them I did—and from my brother Frank. And they showed me them.

I read them. And said, "Now, are you ready to make a confession?"

I told them no, "I don't know anything about those confessions," I said, "But I didn't have anything to do with it and I am not going to sign any confession."

They said, "Well, John, the best thing for you to do is to sign a confession, make it easier on you, we're going to get you back in Washington anyhow and everything will come out and you are going to get a real stiff sentence."

I told them I wouldn't sign. He said, "If that is the case-we will just have to turn you back to the Chicago police."

I said I had no confession "but give me their confession and I will copy from theirs."

He said, "No, I want it in your own words."

I told him I didn't have my own words to put into a confession because I didn't do it.

So he handed me, I believe it was Straymer's confession and I—not the exact words, but I quoted from that as Straymer had implicated me and I believe it was Sergeant Wilson typed it down.

Q. You say that the police, that is, Officer Greco and Officer Wilson, showed you your brother's confession, is that right? A. Yes.

Q. And did they show you a written confession by Straymer? A. Yes, sir.

Q. And both of those confessions involved you,
76 is that right? A. That's right, yes, sir.

Q. After you saw those two confessions did you make a confession? A. I quoted Mr. Straymer's confession to make—

Q. I show you Government's marked for identification No. 2.

Mr. Carey: We will stipulate as to that, Your Honor.

* * * * * * * * * *

Q. I believe I was showing you Government Exhibit No. 2, the statement. I ask you, the information that is in that statement, did you get that from the confessions of your brother and the other co-defendant? A. From the other co-defendant?

Q. Straymer. A. Co-defendant Straymer?

The Court: Does the record show now that he has read this statement from beginning to end?

Have you read this statement?

The Witness: Yes, sir.

The Court: Just so the record shows that.

By Mr. McLaughlin:

Q. Did you read it after Mr. Wilson typed it? A. Yes, sir.

Q. Did you sign it after you read it when Mr. Wilson handed it to you? A. Yes, sir.

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The Court: I have to rule as a matter of law at the proper time whether or not I feel first that the police officer in Chicago, when he received the information from Washington—that has all been gone into—whether or not he had probable cause to believe that a felony had been committed, whether or not he had the right to arrest without a warrant, whether or not that arrest was legal, whether or not the search incidental to that arrest was legal, and then the following question is whether or not, as I understand it, the man was held in custody too long. I think you will raise that.

Mr. Carey: That is correct.

The Court: And the question of whether or not the confession should be admitted.

77 I believe that I have a right and I intend to do it, frankly, to listen to any evidence that the government can show of an impeaching nature insofar as this confession is concerned. He said in effect—I mean the defendant, as I understand his testimony—that he was shown the confession of Mr. Straymer and that he made his confession or made a statement, put it that way—I want to find out, frankly, and I intend to ask him some questions on this confession after Mr. McLaughlin finishes, what he told about the alleged confession on a prior occasion. I think I am entitled to all of these facts in order that I might make up my mind not only as to the voluntariness of the confession, if it was voluntarily made, but on several matters in the trial.

I don't see that there is any harm being done to this man. He is not in the presence of the jury. As a matter

of fact, he may not even take the stand. I don't know. I think you indicated he would not take the stand, is that correct?

Mr. Carey: That is correct.

The Court: I can assure you he is not being prejudiced in my mind by this evidence and I think I can sift this evidence and make up my own mind at the proper time in connection with the ruling I am going to make.

Mr. Carey: I understand your position.

The Court: You may proceed.

By Mr. McLaughlin:

Q. You do remember appearing before Judge Curran, do you not, on your motion to withdraw your plea of guilty? A. Yes, sir.

Q. Do you remember you took the stand in that hearing, did you not? A. Yes, sir.

Q. And Judge Curran at that time asked you about your confession, did he not? A. Yes, sir.

Q. And didn't you tell him at that time that the information in this confession was told to you by the Chicago police? A. No, sir.

78 Q. Didn't he then say that you told the probation officer the same statement as the confession, and didn't you tell him at that time that the Chicago police told you to say what was in the confession? A. Yes, sir, I didn't say I got—

* * * * * * * * * *

The Witness: I didn't say that the Chicago police give me that information. I said the Chicago police told me I better repeat that to anyone that wants to know anything about this case, stick to that story. The judge said, "They are not here. They can't harm you here." No, he said, "The Washington police are not going to harm you."

I said, "I know, it is the Chicago police that told me."

He said, "They are there. They are not going to mess with you."

* * * * * * * * * *

Q. When did the Chicago police see this confession, if you know? A. No, I don't know.

Q. They weren't present when you signed it, were they? A. They were right outside the door.

Q. They weren't present in the room when you signed it? A. There was no closed doors.

Q. As far as you know, did you see any of them read it? A. No, sir, I did not.

Q. So as far as you know they have no information of what is contained in this statement, is that right? A. I took it that they did.

Q. Why did you take it that they did? A. When they told me to stick to that confession.

Q. What else did they tell you about sticking to the confession? A. They just told me I better stick to the confession.

Q. Why? Did they say why? A. No, the way he said it I knew why.

* * * * * * * * * * *

Q. Did the police ask you—that is, Greco, ask you whether or not you would come back by airplane? A. Yes, they did.

Q. What was the treatment of the Washington police in Chicago, to you? A. Treatment of the Washington police?

79 Q. Yes. A. In what way do you mean, sir?

Q. Any way. A. Well, as far as I am concerned they treated me very nice.

Q. Officer Greco and Officer Wilson, you say, during the time you were with them in Chicago, they treated you very nice, is that right? A. That's right.

Q. Coming back in the plane did they talk to you about the case? A. We had conversation mostly pretty near all the time about parachute jumping.

The Court: Parachute jumping?

The Witness: Yes, my brother was a paratroop jumper and they were asking him a lot of questions about jumping.

By Mr. McLaughlin:

Q. They didn't question you at all on the way back? A. No, sir.

Q. When you got back to police headquarters in Washington, you saw Mr. Parks? A. Yes.

Q. You knew Mr. Parks? A. Yes, sir.

Q. You had worked with him prior to this time? A. Yes, I knew Mr. Parks and just about everybody there.

Q. What? A. I knew Mr. Parks and just about all the employees there.

Q. You were asked to read this confession to Mr. Parks, were you not? A. Yes, sir.

Q. Did you do that? A. I did.

Q. Did you say anything to Mr. Parks that the contents of this confession was not true? A. No, I did not.

Q. Did you make any complaint to him about your treatment by the Chicago police and that was the cause of this statement? A. No, I did not.

Q. And you signed this confession again after you read it to Mr. Parks, isn't that right? A. Yes, I believe Sergeant Greco asked me to sign it again in front of Mr. Parks.

80 Q. That was after you read it to Mr. Parks? A. Yes.

Q. And no abuse—that is the police didn't abuse you in any way at that time? A. No. Mr. Greco—Sergeant Greco and Sergeant Wilson never did abuse me.

Q. When you signed this statement in Chicago you read the first part, did you not, that you do not have to make the statement but if you do the statement can be used for or against you if this case goes to trial? A. Yes, sir, I believe I did read that.

Q. That was on the paper at the time that you signed it, isn't that right? A. To be frank with you, I don't remember it was, but if it was on there I read it.

Q. Take a look at it. Can't you see that it was on there at the time that you signed it? A. It appears to be on there.

Q. And it was on the time that you read the statement to Mr. Parks in police headquarters, isn't that right? A. I believe so.

Q. Do you have any doubt? A. Yes, sir, but I don't definitely remember if it was on there. I am not saying it was not on there. I just say there is a doubt in my mind that it was.

Q. I will ask you again to take a look at the paper.

Mr. Carey: I object. That question has been asked previously.

The Court: Well, I think I will let him ask it again.

Mr. McLaughlin: There seems to be a doubt in his mind.

By Mr. McLaughlin:

Q. Was that the same paper you signed in Chicago? A. Yes, that's my handwriting.

Q. Is that the same paper you signed in Washington in front of Mr. Parks? A. Yes, Mr. Parks' name right here. I signed underneath his name.

Q. Is there anything from that paper that would indicate that that first paragraph was not on it at the time you read it to Mr. Parks? A. No, there is nothing on here to indicate that, no, sir.

Q. I believe you testified on direct examination that all during this time that you knew that you could have
81 a lawyer if you wanted one, is that what you said? A. I believe that is what I said, yes, sir.

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The Court: Mr. Hodges, I notice on the last line here you said, "I have finished high school and can read and write," correct?

[Witness nodded.]

The Court: Where did you go to high school?

The Witness: Tampa, Florida.

The Court: Is that your home?

The Witness: Washington, D.C., is my home. I have been going back and forth to Tampa, Florida. My mother lives there and my father was living here.

The Court: How old are you?

The Witness: 29 years old.

The Court: At the time of this alleged offense in '55, you were 27, about?

The Witness: Yes, sir.

The Court: You knew, did you not, that by the time they got you back in Washington, from your experience and knowledge of affairs and all, you knew that if you wanted a lawyer before you made this statement you could have gotten one, did you not?

The Witness: It didn't occur to me, Your Honor.

The Court: While the police had you in custody on the plane they had the handcuffs off of you, did they not?

The Witness: Yes, sir.

The Court: And they were having, were they not, a friendly discussion with you, on the way back to Washington?

The Witness: Yes, sir.

The Court: And you were talking about parachute jumping, I think?

The Witness: Yes, sir.

The Court: No conversation was had about the alleged robbery?

82 The Witness: No, sir.

The Court: In Chicago, now, there was somewhat of a delay because of the fact that the police officer had some difficulty—that is, Mr. Greco, of Washington—were there two of them that came out there, Mr. Greco and Mr. Wilson?

The Witness: Yes, sir.

The Court: Were they having some difficulty getting four seats together to come back on the American Airlines?

The Witness: Yes, sir. They told me that on the first, I believe it was, they told me they couldn't get—I asked them when would we be going back? I was anxious to be going back.

They said, "We would like to go today but we can't get any reservations. We will try to get some for tomorrow."

The Court: That more or less delayed them. That required them to stay in Chicago another day?

The Witness: Yes.

The Court: Because they couldn't get reservations until the following day.

The Witness: Yes.

The Court: You were advised of that fact?

The Witness: Yes.

The Court: And you realized that that was causing somewhat of a delay in not bringing you back to Washington, isn't that true?

The Witness: Yes, sir.

The Court: As I understood your testimony, you never did admit to the Chicago police your participation in this robbery of the Briggs Company in Washington, is that true.

The Witness: That's true.

The Court: Did you ever admit to the Washington police in Chicago that you participated in this robbery?

The Witness: That's where that statement was made, sir.

The Court: This statement was made in Chicago?

The Witness: Yes, sir.

83 The Court: And signed in Chicago?

The Witness: Yes, sir.

The Court: And where was it made in Chicago?

The Witness: In—

The Court: Office of the robbery detail, Chicago, Illinois police department? That was made out there?

The Witness: Yes, sir.

The Court: Were any threats used against you before it was made?

The Witness: Mr. Wilson and Mr. Greco?

The Court: Yes.

The Witness: No, the only thing they said that scared me they said that, "If you don't make one we will just have to turn you back over to the Chicago police," so I told them to give me one of the confessions and "I will just make one from that."

The Court: You knew, did you not, what their purpose was for being in Chicago?

The Witness: To bring me back to Washington. Yes, sir.

The Court: Have you ever had a lawyer in connection with any other matter? I am not talking about any other case if you were involved. Have you ever had a lawyer before?

The Witness: Several cases, yes, sir.

The Court: You knew what your rights were in connection with obtaining an attorney, didn't you?

The Witness: I didn't know anything about the rights. I imagine I did, Your Honor, but I just didn't think about a lawyer or anything. I was just thinking of getting this thing cleared up, get to Washington and get it cleared up and get back there.

The Court: I think you said in one part of your testimony, I believe, you correct me if I am in error, that you knew that you were entitled to be represented by a lawyer,

but you did not think of it, did you say that in answer to somebody's question.

The Witness: Yes, sir, I believe so.

84 The Court: Either your lawyer or Mr. McLaughlin?

The Witness: Yes, sir.

The Court: That you knew you were entitled to be represented by a lawyer, but you did not think of it?

The Witness: Yes.

The Court: That is all.

Have you concluded the evidence on this particular point?

Mr. Carey: Yes, sir.

The Court: Mr. Carey, will you now summarize your reasons why you feel the Court should not make its ruling at this time in the manner I have already indicated.

After I have heard you I will hear Mr. McLaughlin and I will make my ruling.

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Court's Ruling on Arrest, Search and Confession

The Court: The Court is ready to rule on the motion.

First of all, I will direct my remarks to the legality of the arrest without a warrant in Chicago. The Supreme Court in Brinegar vs. U.S., 338 U.S. 160, had this to say:

> "The test by which the propriety of an arrest without a warrant is to be judged has been defined with great particularity in this case. The Supreme Court pointed out that the standard of proof required for probable cause is far less stringent than that required to establish guilt, that nothing more is required to justify an arrest than that the circumstances known to the officer by personal observation or by information be such as would justify a man of reasonable caution in the belief that an offense had been committed, that the existence of probable cause must be determined in all cases by an act of judgment performed in the light of the particular situation and with account taken of all the circumstances."

The Court cites U.S. vs. Rabinowitz, 339 U.S. 56, and the Brinegar and Rabinowitz cases were specifically fol-

lowed by the U.S. Court of Appeals in the District
85 of Columbia in rendering its decision in the case of Mills vs. U.S., App. D.C. 365.

It is difficult to find any two cases that are on all fours with respect to the facts and circumstances of each case.

I think every lawyer will practically agree on that. There is some difference or variation in the circumstances and facts and other things.

I am going to conclude as a matter of law, No. 1, that the officer did have probable cause for the arrest in Chicago without a warrant of arrest; two, that as an incident to that lawful arrest, he had a right to make the search and seizure which he made.

I am going to rule that in this case I do not believe that there has been shown by evidence, substantial credible evidence, testimony that there was any unnecessary delay, and therefore it follows if there was no unnecessary delay in the arraignment, therefore the confession will be admitted.

I have decided those three points. At the proper time I will instruct the jury on the question of confessions. They can decide whether it was voluntarily made or involuntarily made.

That, in effect, sums up my ruling in this case.

We will take our recess now until 1:45.

Is there anything further you think the Court has not covered?

Mr. McLaughlin: No, Your Honor.

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AFTERNOON SESSION

1:48 p.m.

[The jury returned to the jury box.]

The Court: Are you ready?

Mr. McLaughlin: Yes, Your Honor.

Mr. Carey: Your Honor, could we have just about two moments?

The Court: Take all the time you need.

Mr. McLaughlin, are there any witnesses in the court who haven't testified?

86 Mr. McLaughlin: No, Your Honor, but I believe some of those are in the courtroom who have testified who will be recalled.

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HAROLD P. PARKS

was recalled as a witness by the government • • •

Direct Examination

By Mr. McLaughlin:

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Q. After this robbery on July 30, 1955, did there come a time when you saw the defendant John Hodges after that? A. Yes, sir.

Q. Can you recall the approximate day and date that you saw John Hodges after July 30, 1955? A. It was early in May of 1956. I believe it was the 2nd or 3rd day of May when he was returned from Chicago by the Washington police.

Q. Where did you see the defendant John Hodges on that date? A. At police headquarters here in Washington.

Q. Do you recall whereabouts in police headquarters you saw him? A. In the robbery squad room.

Q. Can you tell us the approximately time that you saw John Hodges? A. I would say it would be about 4:30, quarter to five in the afternoon.

Q. Did you talk to John Hodges at that time? A. Yes, sir.

Q. I will show you Government Exhibit marked for identification No. 2.

I will ask you whether or not you can identify that. Just yes or no. A. Yes, sir.

Q. On May 2 of 1956, while you were in police headquarters in the robbery squad in the presence of John Hodges—who else was present?

Mr. Carey: I think Mr. McLaughlin inadvertently identified the wrong date. It is May 3rd.

The Witness: May 3rd.

By Mr. McLaughlin:

87 Q. Who else was present at that time? A. Detectives Greco and Wilson of the robbery squad. I

think there were some other policemen around. I didn't pay any attention to who they were.

Q. At that time did you see Government Exhibit marked for identification No. 2? A. Yes, sir.

Q. In whose possession was Government Exhibit for identification No. 2 when you saw it on May 3rd at police headquarters? A. I believe Detective Wilson showed it to me first. I believe it was Wilson.

Q. Did you see it in anyone else's hands there at the time? A. Well, I saw Mr. Hodges.

Q. When you say Mr. Hodges you are referring to whom? A. The defendant in the case.

Q. Do you see him in court here today? A. Yes, sir.

Q. Will you point him out? A. Sitting between the two attorneys.

Q. May the record show he identifies the defendant.

The Court: It may so show.

By Mr. McLaughlin:

Q. What did you see John Hodges do with Government Exhibit for identification No. 2? A. He read it over at the request of the police officers. He read it over in front of me. They requested that he read it in front of me.

Q. Did he read it in front of you? A. Yes, sir.

Q. After the defendant read it in front of you did he sign it in your presence? A. Yes, sir. I believe that Sergeant Greco—well, he wrote on there that this statement was read in front of me and put the time and date and Mr. Hodges signed it.

Q. Did you sign it at that time? A. I signed it as a witness, yes, sir.

Mr. McLaughlin: That is all I have.

Cross Examination

By Mr. Carey:

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88 Q. Mr. Parks, Government Exhibit 2, you say you saw in the hands of Mr. Hodges, the defendant, on May 3rd, about 4:30 o'clock in the afternoon, is that correct? A. Yes, sir.

Q. You saw him read that exhibit, is that correct? A. Yes, sir.

Q. Did he read it aloud or did he not? A. He read it aloud.

Q. You mean he read it so everybody could hear? A. He read in a sort of a low tone. We were sitting around a desk, as I recall. He didn't speak very loud.

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Q. So he was in quite strict custody, is that correct, at the time when he was handed this Government's Exhibit No. 2? A. Yes, sir.

Q. Did these police officers say anything to him at the time he was handed Government's Exhibit No. 2? A. He was requested by, I believe, Greco, to read it in front of me as I was the complaining witness.

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Q. You didn't know the circumstances under which this Government's Exhibit No. 2 was secured from the defendant Hodges, is that correct? A. No, sir.

Q. You didn't know whether this man was arrested on April 29th, you didn't know whether he was in the custody of the police on April 29th, you didn't know whether he was arrested on April 30th and in the custody of the police on April 30th. The same thing prevails as to May 1st, May 2nd, and May 3rd, is that correct? A. To a limited degree, sir. I knew that he had been arrested in Chicago previously, and I believe I had been told that he was arrested in Chicago on Sunday.

Q. Did you know the date and circumstances under which this man was arrested prior to May 3, 1956? A. No, sir, I did not.

Q. You did not know whether this Government Exhibit No. 2 was secured voluntarily or involuntarily from Mr. Hodges, is that correct? A. I know nothing about it, sir.

89 Q. You didn't know whether coercion or pressure was exercised on this defendant or not when he signed that, when he signed that? A. No, sir.

Q. In other words, Mr. Parks, you don't know anything about the manner in which this Government's Exhibit No. 2 was secured? A. No, sir, I don't.

Q. You have no information at all, is that correct, as to how that Government Exhibit No. 2 was secured? A. No information at all as to how it was secured, sir.

Q. So you placed your signature on that exhibit on the afternoon of May 3, 1956, about 4:30 in the afternoon, is that correct? A. Yes, sir, I did.

Q. 5:30 p.m.? A. 5:30.

Q. Does that confession indicate that it was signed on May 2, 1956, at 3:35 p.m.? A. It says it was completed at 3:35 p.m., May 2, 1956.

Q. Did you read that before you affixed your signature to that paper? A. I read the statement, yes, sir.

Q. Did you ask the police where that confession was secured? A. No, sir, I did not.

Q. Did you ask them where it was secured? A. Well, when I—after Mr. Hodges had read it and I looked at it myself I saw that this Chicago up here—I mean I saw this up here.

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Redirect Examination

By Mr. McLaughlin

Q. Just one question. During any of the time that the defendant was in your presence in police headquarters with reference to reading that statement, did he make any complaint to you that the police had abused him in any fashion? A. No, sir, he did not.

Q. Did he say anything to you that that was not his confession, that it was not voluntary upon his part? A. No, sir.

Q. Did he say to you at any time that anyone had
90 told him to say what was in that statement? A. No, sir, he didn't say anything at all.

Q. Was there anything about his demeanor or his actions during the time that he read that statement to you that would indicate to you that it was not a voluntary statement? A. No, sir, there wasn't.

Mr. McLaughlin: That is all.

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CHARLES FITZGERALD

was called as a witness by the government and, having been previously duly sworn, was examined and testified as follows:

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Direct Examination

By Mr. McLaughlin:

Q. Officer Fitzgerald, on April 29th of 1955—'56, rather, did you receive certain information from the Washington police? A. Yes, I did.

Q. As a result of that information where did you go? A. I went to a location at 4135 North Greenview Avenue.

Q. What is located at that— A. That is a rooming house.

Q. Did you enter that rooming house? A. Yes, I did.

Q. At the time that you went to that rooming house you were looking for whom? A. I was looking for John Hodges and Frank Hodges.

Q. What time would you say you arrived at that rooming house? A. Arrived at that rooming house about 6:00 o'clock that evening.

Q. Was there anyone with you at that time? A. Yes, my squad was with me.

Q. How many other officers were with you? A. Two.

Q. When you arrived at those premises did you enter those premises? A. Yes, I did.

Q. How did you enter those premises? A. I rang the bell of the landlady.

Q. When you rang the bell did you see the land-
91 lady? A. Yes, I did.

Q. Then how did you enter? A. She allowed me to enter her apartment and I identified myself and told her who I was looking for.

Q. Did you and your other officers enter the premises? A. Yes.

Q. What part of the premises did you enter and where did you go in those premises? A. We went to the apartment of the landlady, told her who we were looking for and we asked her if Frank or John Hodges lived there in the building. She told us that they did, that John lived in

the first floor apartment with his wife and small child and that Frank lived in a room on the second floor.

Q. After you received that information where did you go in those premises? A. We remained there in her apartment. We asked her if she had seen John Hodges or Frank. She said she hadn't seen either one of them that day and she said if the car is out front that John is probably at home and when John is home Frank is usually there.

The car wasn't there. We told her that we had received a message that John was to get a phone call on that telephone in the hallway at 7:00 o'clock that evening. And we remained in her apartment for several minutes, I'd say, went downstairs and we knocked on the door of John Hodges, we knocked on the door of Frank Hodges, and there was no response. The car wasn't out front. So we told her that we would be back by 7:00 o'clock. We left and we returned at 7:00 o'clock.

Q. When you returned at 7:00 o'clock did you enter the premises? A. Yes, we did.

Q. How did you enter the premises when you returned at 7:00 o'clock? A. We rang the door bell of the landlady again. She allowed us to come in. We waited in her apartment for the phone call. The phone call came in at exactly 7:00 o'clock. When that phone call came in she knocked on the door of John Hodges' apartment. There was no answer to the knock. The lights were out in the apartment and nobody was home apparently. So we left the premises and we returned then about 9:00 o'clock.

92 The lights were on in the Hodges' apartment. It was about 9:00 o'clock when we got back. We knocked on the door of the apartment of John Hodges.

He opened the door and we told him that we were police officers and we showed him our stars and we told him that we were there to arrest him for Washington on a robbery charge.

Q. What happened after that? A. We asked him if we could come in and he said yes, come right in.

We walked in and we asked him if we could look around the apartment, if it would be all right, and he said that it would.

I asked him if he had any guns in the apartment.

He told me that he had two guns in his suitcase. And he showed me the suitcase. It was on a shelf in the bedroom.

We took the suitcase down and opened the suitcase and there was one gun in there. It was a .32-caliber revolver, with some ammunition for a .38-caliber revolver in the same suitcase. I asked him where the other gun was and he said, "Well," he said, "my brother must have that," meaning Frank.

Frank was not at home and we were unable to locate Frank.

We took John with us to the detective bureau. And we put him in our detective bureau lock-up and notified our chief clerk to notify Washington, D. C., that John Hodges was arrested.

Q. And what time would you say that you returned him to the lock-up that evening? A. It was about 9:30.

Q. Did you see the defendant any more that night after 9:30? A. No, I did not.

Q. April 29? A. No, I did not.

Q. When did you next see the defendant after that April 29th? A. It was on the first of May.

Q. From that time, April 29, 9:30, until May 1st, did you have an occasion at all to talk to the defendant Hodges? A. No, I did not.

Q. Did you question the defendant Hodges as to this robbery in Washington that you were arresting him
93 for? A. Yes, I did. I asked him—

Q. When did you question him? A. At the time of his arrest.

Q. What questions did you ask him and what answers did he give you as near as you can recall? A. I asked him if he had committed the robbery in Washington. He told me that he did not commit any robbery in Washington. I asked him, "Well," I said, "how do they know about you—

Q. Do you know—where did you see him on May 1st, 1955? A. At the detective bureau.

Q. What, if anything, was done with the defendant on May 1st, 1955? A. On that day he was taken before the Chief Justice of the Criminal Court. My squad took him over there. I didn't go along.

Q. What was the purpose of going over there? A. He

was taken over there because a warrant had been received from Washington on that day and he was taken over to the Chief Justice of the Criminal Court to sign a waiver for his extradition.

He waived extradition, that he would return to Washington.

Q. Prior to taking him over there had you talked to him about going back to Washington? A. At the time of the arrest I asked him about that, yes.

Q. What did he say to that? A. He said he'd like to go back there and get it all straightened out.

Q. Do you know when the Chicago police notified the Washington police that the defendant had been arrested in Chicago? A. Well, I can't say when the Chief Clerk notified Washington. I can only say that I notified the chief clerk of the arrest on April 30.

Q. May 1st—I believe you said that the Chicago police had received arrest warrants for the defendants on—defendant—on what date? A. On May 1st.

Q. Of '55? A. Of '56.

Q. '56. That's right. As far as bringing the defendant before a magistrate, the Chief Justice, in an extradition, is it necessary in Chicago to have a warrant for that?

A. Yes, it is.

94 Q. Was that the reason why the defendant was held, not brought before the Chief Justice until the warrant came from Washington? A. That's correct.

Q. I will show you Government Exhibit marked for identification No. 1, Mr. Fitzgerald.

Are you familiar with that exhibit? A. Yes, I am.

Q. And that exhibit is what? A. That's a waiver of extradition signed by John Hodges.

Q. Before what court? A. Before the Chief Justice of the Criminal Court, County of Cook.

Q. After you saw the defendant on May 1st of 1956, did you see him any more after that? A. I believe that I saw him for just a short time on the 3rd when he was turned over to the Washington police.

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Q. • • • As far as you know, Mr. Fitzgerald, did the defendant at any time make any confession or admissions

——to the Chicago police of committing the robbery of Briggs on July 30 of 1955? A. As far as I know, he did not.

Mr. McLaughlin: That's all I have of this witness.

Cross Examination

By Mr. Carey:

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Q. Mr. Fitzgerald, what time was it when you arrived in these premises in Chicago where the defendant was living with his wife and child? A. What time was it when I first arrived there?

Q. That is correct. A. I believe it was around 6:00 o'clock.

Q. On April 29, is that correct? A. That's correct.

Q. When was it you first entered into the rooms which were occupied by Hodges and his wife and child? A. About 9:00 o'clock.

Q. Where were you between 6:00 o'clock and 9:00 o'clock on the evening of April 29? A. I left there—when I arrived at 6:00 o'clock I was there probably 20 minutes and I left. We were working on the robbery detail and we had some work to do and we were out on an
95 assignment of a robbery gang. We came back there at 7:00 o'clock when a phone call was received. We stayed there for about 10 minutes and left again. We arrived back the third time at about 9:00 p.m.

Q. Where did you stay during this time between 6:00 o'clock and 9:00 on the two occasions when you were at the premises? A. Where did I stay?

Q. Yes. A. On the second floor front apartment, the apartment occupied by the landlady.

Q. You had her permission, is that correct? A. That's correct.

Q. How did you get into the rooms occupied by Hodges and his wife and child? A. Just walked up to the first floor and the door was open and I walked in and when I got to his door I knocked on his door, the door of his apartment.

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Q. Where was Hodges when you got into this second door, through the second door? A. When I knocked on his door, do you mean?

Q. Yes, sir. A. When he opened the door he was standing there.

Q. Where was his wife at that time, if you know? A. I don't recall her being in the apartment.

Q. Did you see his wife at all that particular night? A. Yes, I did.

Q. Where did you see her? A. She came down the hallway and entered the apartment after we had gotten into the—

Q. Where was the baby during that time? A. The child was in the apartment.

Q. What was the first conversation you had with Hodges when you first saw him? A. I identified myself as a police officer.

Q. Did you have your gun drawn when you walked in that door? A. No, I did not.

Q. How about the other police officers with you, 96 did they have their guns drawn? A. They did not.

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Q. You made no effort to pull your gun at any time? A. No, I could see his hands. I didn't pull my gun.

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Q. Having gotten into the apartment, Officer, what did you do in there? A. I asked Mr. Hodges if it would be all right if I looked around the apartment.

Q. What did Mr. Hodges say? A. If he had any objections. He said he had no objections.

Q. He said go ahead? A. He said, "I have no objections."

Q. So then you did what? A. I started to look through the apartment.

Q. What did you do specifically in that apartment? A. Well, I asked him if he had a gun.

Q. What did he say to that? A. He said yes, he had two guns.

Q. Did he tell you where the guns were? A. Yes, he did.

Q. Where were they? A. One gun was in a suitcase. I didn't find the second gun.

Q. You didn't find the second gun. A. Not there, no.

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Q. Did you have any warrant with you? A. I had no warrant with me.

Q. Did you have an arrest warrant? A. I said I had no warrant with me.

Q. Did you have a search warrant? A. No, sir.

Q. How long did you stay in this apartment? A. Probably about 10 or 15 minutes.

Q. During that entire 10 to 15 minutes, what was the substance of the conversation between you and Hodges or between you and his wife? A. Well, as I said before, I asked him about the robbery and I asked him where his car was.

97 Q. And when you asked him about this robbery, what was his answer to that? A. He denied committing any robbery.

Q. Did you ask him on more than one occasion about the robbery? A. I believe that was the only time that I asked him.

Q. You asked him on one occasion what? A. I asked him if he committed a robbery in Washington, D. C.

Q. What did he say to that? A. He said no.

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Q. Mr. Fitzgerald, you left the apartment after 15 minutes or so, is that correct? A. That's correct.

Q. Where did you take him then? A. To the detective bureau.

Q. What time of the night was it when you took him to the detective bureau in Chicago? A. About 9:30.

Q. What did you do with him there? A. I took him to the detective bureau lock-up and left him there.

Q. Was he fingerprinted or mugged at that time? A. At that time he was fingerprinted.

Q. How long did that take? A. I wouldn't know, probably a few minutes.

Q. Did you stay with him when he was in the cell block? Did you interrogate him any further? A. No, I did not.

Q. What time did you leave him that night? A. Shortly after I brought him there. Just a few minutes later.

Q. Did you interrogate him during the time when you rode from his premises down to the detective bureau while you were in the car? A. I believe I asked him how long

he had been in Chicago and I believe I asked him if he did any robberies in Chicago.

Q. What did he say to that? A. He said no.

Q. So during the time you were with him on Sunday evening, April 29, you asked him once if he was involved in a robbery in Washington, D. C., is that correct? A. The one time I asked him was the time of the arrest.

Q. You didn't spend much time in questioning him about that robbery, did you? A. I did not.

98 Q. You went to arrest him because of that alleged robbery, did you not? A. That is correct.

Q. Only on one occasion did you ask him about the robbery? A. I asked him if he did the robbery.

Q. How long was he with you during that evening? A. Probably about an hour, maybe a little more, maybe a little less.

Q. What else did you ask him during that one hour he was with you? A. I asked him how long he had been in Chicago, and where he came from.

Q. When did you again see him after you left him in the cell block in detective headquarters? A. On the first of May I saw him for a short time.

Q. So he was away from you from April 29 to—at about 9:30, until May first at what time? A. Must have been around 11:00 o'clock in the morning.

Q. During that period of time, which is approximately two days, did you ever advise this man as to his constitutional rights? A. I did not.

Q. Did you ever tell him that he was entitled to have a lawyer represent him after he was arrested? A. I did tell him that he was entitled to waive, if he felt like going back to Washington, or he didn't have to do that. He could get a lawyer and he could be represented in Chicago.

Q. What's that? A. I told him he could get a lawyer and be represented in Chicago.

Q. When did you tell him that? A. Right after I made the arrest.

Q. What did you say, specifically? A. I told him that if he wanted to go back to Washington that was up to him.

Q. I asked you about—did you tell him he was entitled to be represented by an attorney? A. You asked me what? I didn't get that.

Q. I will phrase the question again, Mr. Fitzgerald.

Between the arrest on April 29, the Sunday night,
99 and when he went before a judge in Chicago on May 1st, did you at any time tell him during that period that he was entitled to be represented by an attorney? A. I did as far as the extradition is concerned.

Q. That isn't what I asked you.

Did you at any time between the arrest on April 29, and the extradition hearing, advise him that he was entitled to have an attorney represent him? A. Yes, I did.

Q. When did you tell him that? A. Right after the arrest.

Q. What time was that? A. It was shortly after the arrest when I asked him about the robbery in Washington.

Q. You now remember that you told him on April 29th he was entitled to be represented by an attorney. As far as the extradition. That is all I knew about it. I didn't know anything about the robbery.

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Q. When did you tell him this? A. Right after his arrest.

Q. What time was that? A. That was right after 9:00 o'clock on April 29th.

Q. So now we have you asking him one question about the robbery in Washington the night of the arrest. You have asked him one question about the car, you asking him one question about the extradition, and now you tell us you advised him he was entitled to a lawyer. A. The last question, I didn't get that.

As far as the extradition proceedings—

Q. Did you tell him he was entitled to have an attorney on any other matter? A. I didn't discuss anything other than the extradition, when we asked him about the robbery, if he had done the robbery.

Q. Were you present when he was at the hearing before the judge in Cook County being extradited? A. I answered that previously, that I was not there. My squad had taken him over there.

Q. So whether he was advised about his constitutional rights, you were in no position to answer, is that correct? A. That's correct.

Q. As to whether he was advised as to whether he was entitled to have a lawyer, you do not know, is that correct? A. At the court hearing? That's correct.

Q. Do you know Mr. Fitzgerald, that his wife on many occasions, after you took her husband from her home, made attempts to find out from the Chicago police where her husband was?

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The Witness: She had called me.

By Mr. Carey:

Q. Did she? A. She did.

Q. What did you tell her? A. I told her he was being held for Washington on a robbery charge.

Q. Did she ask you anything about a lawyer? A. She did not.

Q. Did you tell her he was entitled to a lawyer? A. I didn't discuss that with her.

Q. How many times did she talk to you? A. I talked to her on the telephone, I don't know how many times, maybe once, it may have been twice.

Q. Officer, as I understand it, the only time you questioned this man was April 29, 1956, is that correct? A. That's correct.

Q. You didn't question him on April 30? A. No, I did not.

Q. You didn't question him on May 1st? A. No, I did not.

Q. You didn't question him on May 2? A. No, I did not.

Q. You didn't question him on May 3? A. No, I did not.

Q. Do you know of your own knowledge whether other Chicago police officers questioned this man on April 29, 1956, other than you? A. I do not know that.

Q. Do you know of your own knowledge whether other Chicago police officers other than you questioned this man on April 30, 1956? A. I do not know.

Q. Do you know of your own knowledge whether other Chicago police officers other than you questioned this defendant on May 1st, 1956? A. Questioned him about the robbery?

Q. That's correct. A. I don't know that.

101 Q. Do you know of your own knowledge whether other Chicago police officers other than you interrogated this defendant on May 3, 1956? A. No, I don't know that.

Q. Do you know of your own knowledge whether he was taken to Cook County Jail by Chicago detectives when he was confined in Chicago? A. He was taken to the Sheriff of Cook County.

Q. Do you know of your own knowledge whether this man ever saw a lawyer between April 29 and May 4, 1956, when he was returned to Washington? A. I do not know.

Q. Mr. Fitzgerald, do you know of your own knowledge what time the Chicago police were notified that Mr. Hodges was in Chicago on April 29, 1956? A. About 2:30 in the afternoon.

Q. Is that when you learned it or when the Chicago police learned it? A. That is when the message was received.

Q. Did you make any attempt to secure an arrest warrant in Chicago at the receipt of this information? A. No, I did not.

Q. Did you make any attempt to secure a search warrant on the basis of the information you received from Washington? A. No, I did not.

Q. After his arrest, did you at any time suggest that he be taken to the U.S. Commissioner or U.S. District Judge of the federal judiciary in Chicago? A. No, I did not.

Q. Do you know of your own knowledge that an arrest warrant was sworn to in Washington on May 1st, 1956, that such an arrest warrant was never sent to Chicago? A. I don't know that.

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JOHN CURRAN WILSON

Direct Examination

By Mr. McLaughlin.

Q. Mr. Wilson, your full name is what? A. John Curran Wilson.

Q. You are a member of the metropolitan police department? A. I am.

102 Q. Assigned to what detail? A. Robbery squad.

Q. Calling your attention to July 30, 1955, were you a member of the metropolitan police department? A. I was.

Q. Assigned to what detail at that time? A. Robbery squad.

Q. As a member of the metropolitan police department assigned to the robbery squad were you assigned to a robbery that happened down at Briggs, in Southwest, Washington, D.C.? A. Yes, sir.

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Q. As a result of your investigation, did there come a time that you learned of the defendant John Hodges? A. There did.

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Q. What did you do in reference to the defendant John Hodges? A. Making certain information known to the police court of the District of Columbia, we obtained a warrant for his arrest charging him with robbery.

Q. Can you recall what date that was? A. I believe that I obtained the warrant on the 23rd of April. I believe I have a note here.

Q. Look at it and see. A. The 23rd of April.

Q. What year? A. 1956.

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Q. What did you do, if anything, with the warrants that were received by you from police court? A. We forwarded them to the Tampa, Florida, authorities for service.

Q. You say that was on April 23, '56? A. Yes, sir.

Q. After you forwarded those to Florida, did you receive any further information in regard to the defendant John Hodges? A. I did.

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Q. What was that—that information was that John Hodges was where? A. Had gone to Chicago, Illinois.

Q. What did you do, if anything, with the warrants that you had sent to Florida? A. We recalled the warrants from Florida. I don't know the exact date that we

103 recalled them, but I believe it was around the 29th, I believe, of April.

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Q. After that information was sent to the Chicago police, did the local metropolitan police department receive any information, if you know, that the defendant John Hodges had been arrested in Chicago? A. Yes, sir, we did.

Q. When did the metropolitan police department receive the information that John Hodges had been arrested in Chicago? A. It was sometime between 4:00 and 5:00 o'clock on Monday, April 30.

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Q. After you received the information on April 30, I believe, that the defendant was apprehended in Chicago, what did you do, if anything, in reference to bringing the defendant back to the District of Columbia? A. We flew out to Chicago on May 2.

Q. Where were you on May 1st? A. I was home.

Q. Were you working that day? A. I was on my day off.

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Q. On May 2, 1956, did you go to Chicago? A. I did.

Q. And what time did you leave Washington to go to Chicago? A. It was about 8:00 o'clock in the morning.

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Q. What time would you say that you arrived in Chicago? A. Approximately 11:30 their time.

Q. And that was on May 2? A. May 2, a Wednesday.

Q. After you arrived in Chicago on May 2, where did you go in Chicago? A. Went to the police headquarters on State Street.

Q. Did you see the defendant John Hodges there at that time? A. Not immediately, no, sir.

Q. How long were you there before you saw the defendant John Hodges? A. I would say before we saw John was probably an hour and a half to two hours.

Q. And when you saw John where did you see him?

A. First saw him in the office of the robbery detail
104 of the Chicago police department.

Q. And that would be approximately what time? A. Might have been quarter to three or 2:30.

Q. When you saw him at that time did you have any talk with him? A. I did.

Q. Was that talk in reference to the alleged robbery in Washington? A. Yes, sir.

Q. At the time that you talked to him, at that time who was with you or who was present? A. Detective Sergeant Greco, John and myself.

Q. Where were you at that time? A. We were in a small anteroom immediately off of the main office of the robbery detail.

Q. What talk did you have with the defendant John Hodges at that time or what talk did Officer Greco have with the defendant John Hodges at that time in your presence? A. We informed—

Q. Just tell us what you said to him. A. We told him that we were in Chicago and that we had warrants for him for his arrest charging him with the robbery of the Briggs Company in Washington.

John denied that charge.

Q. What did he say? A. That he knew nothing about it.

At that time we showed him certain information that we had.

Q. What did you show him? A. We showed him a confession, a written confession by a man named Thomas Straymer—

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April 12, 1957

The Court: Ladies and gentlemen of the jury, you will recall yesterday afternoon while Mr. Wilson, one of the detectives from Washington, who said he flew to Chicago on May 2 on Capital Airlines with Officer Grego who, I believe, the evidence shows is sick or ill at the present time; that when, sometime after the two officers arrived in Chicago, they went over to where the defendant Mr. Hodges was incarcerated, some police station or detective bureau, or something like that, and had a conversation with
105 Mr. Hodges and apparently told him the reason for their trip out there and I think at first Mr. Hodges denied anything about the robbery or any participation in the robbery in Washington.

Then you will recall Mr. Wilson said—and I am repeating what the shorthand notes show here—then Mr. Wilson stated as follows:

"We showed him a confession, a written conferssion, by a man named Thomas Straymer."

At that time Mr. Carey, counsel for the defendant, indicated he wanted to approach the bench.

The Court has made a ruling on that statement to the following effect, that when a person is on trial, a person like Mr. Hodges, for a crime, anything that was said by anybody else, whether he happens to be an accomplice or defendant in a case, bearing in mind he is the only one on trial here, anything else said by anybody else outside of his presence when he was not prosent cannot be used to bind him.

So I am going to ask you to dismiss from your minds entirely in this case the statement I just read to you that was stated by Mr. Wilson to the effect—and I will give it to you again—"We showed him a confession, a written confession by a man named Thomas Straymer."

You will dismiss that remark from your minds. It is not evidence in this case.

I know you will be able to do that.

Thank you.

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JOHN CURRAN WILSON

the witness under examination at the time of the taking of the recess on yesterday, resumed the witness stand and, having been previously duly sworn, was examined and testified as follows:

Direct Examination—Continued

By Mr. McLaughlin:

* * * * * * * * * *

Q. At the time you talked to John Hodges, who else was present? A. Detective Greco.

106 Q. How long would you say that you and Detective Greco talked to John Hodges at that time? A. I would say approximately an hour.

Q. I will show you Government's Exhibit marked for identification No. 2, and ask you if you can identify that. A. Yes, sir.

Q. Can you identify Government's Exhibit marked for identification No. 2 as what? A. A statement which I typed in the robbery squad office at the Chicago Police Department which was given to me by John Hodges, orally.

Q. Just tell us the mechanics of taking that statement. A. I sat down at the typewriter, Mr. Hodges and Detective Greco—and he told us what had transpired and I—in the case of the Briggs hold-up—and I placed it on paper.

Q. After you placed what the defendant Hodges told you on paper, at that time did you show it to him, after you completed the typing? A. I did.

Q. Did you read it to him or did he read it himself? A. He read it himself.

Q. After he read Government's Exhibit marked for identification No. 2, did he sign it? A. He did.

Q. Is that his signature in the lower right-hand corner? A. Yes.

Q. What time would you say that you started typing that statement, approximately? A. I would say around maybe 3:10 or 3:15.

Q. What time did you conclude the statement? A. 3:25.

Q. How long did you remain after you had taken the statement from the defendant Hodges? That was on what date? A. It was on Wednesday, May 3, I believe, or 2.

Q. Is it on the statement? A. Yes.

Q. What date was that? A. May 2, '56.

Q. After you had completed the statement what happened or what did you do with the defendant Hodges on
107 May 2, of '56? A. After he had signed the statement I think we talked for maybe four or five minutes, and told him about our returning to Washington, how we were coming back.

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Q. Did you finally make arrangements for transportation back to Washington? A. Yes. We had to exchange our tickets from Capital Airlines to American Airlines in order to get passage.

Q. When were you able to get reservations for the re-

turn to Washington? A. I think we left about 11:30 or 12:00 o'clock the following noon, on the third.

Q. Is that when you were able to get reservations for that time? A. Yes, sir, that was the first plane we could catch, that we could get four seats on.

Q. What time did you return or arrive back in Washington? A. It was around 4:00 o'clock.

It might have been a few minutes after.

Q. That would be on what date? A. Third. May 3rd.

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Q. Then after you did that then what happened? Where did you bring the defendant John Hodges? A. We went to the robbery squad at police headquarters.

Q. When you arrived at the robbery squad of police headquarters what time would you say that was? A. Around 5:00 o'clock. Maybe 5:10.

Q. Did you see anyone at police headquarters that you knew at that time? A. Mr. Parks, the complainant in the case, was in our office.

Q. When you brought the defendant back to police headquarters and seeing Mr. Parks, did the defendant have any conversation with Mr. Parks at that time or did Mr. Parks have any conversation with the defendant? A. I think they spoke together, said hello, and shortly afterward we—

Q. You say "we." Who do you mean? A. Detec-
108 tive Greco and myself. I don't know who actually asked Hodges to read his statement that he had given us to Parks but he did read it to Mr. Parks and finished reading it about 5:30.

Q. You say he read the statement given to you. Is that the statement there that he read; that is Government's Exhibit marked for identification No. 2? A. Yes, sir.

Q. At the conclusion of reading it to Mr. Parks, did he sign it again? A. He signed it again in front of Mr. Parks.

Q. Getting back to the time that the statement was taken by you and Officer Greco from the defendant in Chicago, at that time were any promises made to the defendant— A. No, sir.

Q. —to make this statement? A. No, sir.

Q. Were any threats made to the defendant at that time? A. No, sir.

Q. Was there any coercion of any kind used on the defendant to make the statement? A. No, sir.

Q. Would you say the statement was made freely and voluntarily? A. It was.

Q. I show you Government's Exhibit marked for identification No. 3.

I will ask you, during the time that you talked to the defendant John Hodges, when you say he gave that statement that he did and you reduced it to writing—Government's Exhibit marked for identification No. 2—did you have that Government's Exhibit 3 with you at that time? A. Yes, sir, we did.

Q. Did you or Officer Greco have any conversation or talk with the defendant in reference to the gun, Government's Exhibit No. 3? A. John was shown the gun by Detective Greco and he identified it as his gun, one which was registered to him in Washington.

Mr. Carey: Excuse me.

For the purpose of saving time we will stipulate that is the gun Mr. Hodges had on him in Chicago.

Mr. McLaughlin: I am going a little further than that.

109 The Witness: He further stated that this gun was used in the hold-up at the Briggs Meat Company.

Mr. McLaughlin: I believe that is all I have of this witness.

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Cross Examination

By Mr. Carey:

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Q. When did you first learn that John Hodges was arrested by the Chicago police in Chicago? A. I first learned on April 30, 1956, at 5:00 o'clock in the evening.

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Q. What arrangements did you make on April 30 after 5:00 o'clock as to going to Chicago to interrogate or bring back Hodges? A. I made none myself.

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Q. When if you know, were arrangements made for either you or Mr. Greco to go to Chicago? A. They were made on Tuesday.

Q. Nothing was done between April 30 until Tuesday, which was May 1st, is that correct? A. The only thing I know that was done was the call was made to Chicago.

Q. Answer my question, please. A. That is the only thing that I know. Nothing done except the phone call until Tuesday morning.

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Q. When did you go out to Chicago? A. On May 2nd.

Q. May 2nd? A. Yes, sir.

Q. What time was that that you left Washington? A. About 8:00 in the morning.

Q. What time did you first see the defendant Hodges in Chicago on May 2nd? A. I would say around 1:30 or thereabouts, in the afternoon.

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Q. How long was it before you secured this document that the government has proffered to you? A. I finished taking it at 3:25.

110 Q. Was that May 2nd? A. May 2nd. 3:25 in the afternoon.

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Q. When you went to Chicago with your partner, Detective Greco, were you aware that there was a warrant issued by the United States Commissioner here in the District of Columbia and that such warrant never left this building? A. I was not aware it had not left the building. After thinking it over I remember Detective Greco applying for a Commissioner's warrant.

Q. That was before you and Mr. Greco went to Chicago, isn't that correct? A. That's right.

Q. Is it not true that you have no authority to serve a warrant issued by a United States Commissioner? A. It is true unless the Commissioner marks on it a policeman can serve it.

Q. Was that done in this particular case? A. I don't believe so.

Q. If a deputy United States Marshal serves an arrest warrant issued by a United States Commissioner or a federal judge, you have no right to interrogate that prisoner unless you first get permission from the United States Marshal, isn't that correct? A. That is right.

Q. Was there any purpose in your going to Chicago and arresting this man under the authority of a police court warrant and not having the federal warrant served on him? A. I would say that we went to Chicago to talk to John in order to get a confession from him. I believe that if a Commissioner's warrant had been served we still could have talked with him.

Q. But first, what must you have done in order to have talked to him? A. We would have had to get permission from the marshal.

Q. You achieved the very thing that you and your partner set out to do, isn't that correct? A. We got a confession from him, yes.

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Mr. Carey: Ladies and gentlemen of the jury, this is a warrant of arrest, I should like to read it to you with your permission.

"United States of America v. John E. Hodges.
111 Commissioner Docket No. 23, Case No. 11,295. To Carlton G. Beall, United States Marshal, or any other officer authorized to serve same. You are hereby commended to arrest John E. Hodges and bring him forthwith"—

I want to emphasize that word "forthwith,"—

"before the nearest available United States Commissioner to answer to a complaint charging him with robbery at gunpoint of approximately $4,950 in cash in Washington, D. C., on July 30, 1955."

Dated May 1st, 1956.

Return received May 4th, 1956 at 10:00 a.m., and executed by arrest of John H. Hodges at United States Commissioner on May 4, 1956.

Mr. McLaughlin: By whom?

Mr. Carey: Deputy United States Marshal by name of Strain.

By Mr. Carey:

Q. Officer, did you at any time when you talked to this man in Chicago advise him that he had the right to be represented by a lawyer? A. No, sir, I did not.

Q. What was your purpose in not advising him of that right? A. I advised him he did not have to make a statement if he did not want to.

Q. I ask you the other question. Did you advise him as to his right to be represented by counsel when you first saw him in Chicago? A. I never have. I figured that advising him if he did not wish to make a statement would suffice.

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Q. When you got to Chicago,—rather, when you came back here to Washington on May 4, '56, the late afternoon, you presented Mr. Hodges to Mr. Parks who worked for Briggs, is that correct? A. Yes.

Q. You had him read that statement, did you, in front of Mr. Parks, Government Exhibit No. 2? A. Yes, sir.

112 Q. What was your purpose in having this defendant read it in the presence of Mr. Parks and have Mr. Parks sign his name to that alleged confession? A. That is a practice that—

Q. I am asking about this specific case. A. In order that an admission will be made in front of a witness.

Q. Were you afraid that the one that you signed in Chicago was invalid or would not stand up? A. No, sir.

Q. Why did you need corroboration when you came to Washington? A. It is just practice, that is all, that we follow over there.

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Redirect Examination

By Mr. McLaughlin:

Q. A Commissioner's warrant was issued for this defendant in Chicago on May 1st, is that right, as far as you know? A. Commissioner's warrant was issued here.

Q. That is what I say. A. Here in Washington.

Q. In Washington, is that right? A. Yes, sir.

Q. Did the metropolitan police department in Wash-

ington have any authority to send that warrant to Chicago? A. No.

Q. That responsibility was upon whom? A. United States Marshal.

Mr. McLaughlin: That is all.

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Redirect Examination

By Mr. McLaughlin:

Q. You do know that the metropolitan police department have no authority to serve that Commissioner's warrant, is that right? In this particular case? A. They do not. They would not have authority.

Mr. McLaughlin: That is all.

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The Court: Let me ask the officer, and I am not indicating how I am feeling about this case one way or
113 other, and I am going to tell the jury at the proper time it is their function to decide the case on the evidence.

Here is an officer working on this case for several months. Isn't that correct?

Mr. Carey: That is correct, Your Honor.

The Court: He is requested to go to Chicago by his commanding officer who is now deceased, Inspector or Captain—

Mr. McLaughlin: McCarty, Your Honor.

The Court: Assume that the warrant was sworn to here in Washington or on the—what is the day it was sworn to here?

Mr. McLaughlin: The day before.

The Witness: The day before.

The Court: Day before.

Officers like Officer Wilson, Mr. Greco—I am asking a question now—in pursuance of their duty, knowing a man had been arrested out there and being held by the Chicago authorities, do they have to just deliberately remain behind and not follow up on this case and just wait until a warrant gets out there and then act after the United States Marshal has the warrant? Is that their duty or is it their duty to go out there as quickly as possible and talk to the defend-

ant out there and get his side of the case if he wishes to make a statement? What is the officer's duty?

Mr. Carey: My conception of the officer's duty is this, that when a man is in Chicago—such as this defendant was—these officers had a duty to go before the proper officer in this district—who is the United States Commissioner—swear out a complaint. On the base of that complaint an arrest warrant is issued. Then it is the duty of the United States Marshal, through the United States Attorney's Office, to send that arrest warrant posthaste to the city of Chicago by airmail or otherwise.

Had the proper procedure been followed in this case that arrest warrant would have been taken over to the United States Marshal, upstairs to the Grand Jury
114 Division of the United States Attorney's Office, and it would have been served—instead of two days late, as it was—24 to 48 hours previous, and the United States Marshal would have had custody of this defendant and not the police.

The Court: Probably.

Mr. Carey: It seems to me. My position is this thing was done wittingly and with malice aforethought.

Mr. McLaughlin: I object to that statement. He has no evidence of that.

The Court: This probably should be talked about out of the presence of the jury. I am not expressing an opinion one way or another. I am going to let the government proceed and try its case and the defendant proceed and try its case.

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[In open court:]

Mr. McLaughlin: May I read Government's Exhibit No. 2 to the jury?

The Court: Yes.

Mr. McLaughlin: Office, Robbery Squad, Metropolitan Police Department, D. C., Chicago, Illinois, police department. To your help in connection with Briggs and Company 454 11th Southwest at 7:00 a.m., July 30, 1955, you now are requested to make a statement of the facts in this case to the best of your knowledge. However, you are advised that you are not compelled to make a state-

ment. You are not promised anything for making one and do so of your own free will. If necessary, the statement you make will be used against you in court.

Having been so advised, are you willing to make a statement?

Reply by John E. Hodges: Yes, I want to make a statement.

I was living at 5608 15th Place, Chillum, Maryland, with Frank and his family. I don't remember if Tommy Stramer was living there or not. I told them I had worked for Briggs and they had a lot of money there. I knew they had money there because I had turned in late several times and had to go back on Saturday. I would see Mr. Parks with lots of money in front of him. I was short of money at the time and for this reason I decided to take Briggs. Both the others were short of money at the time. I had talked to Frank and Tommy in my apartment about the place. I planned the robbery intending to have my brother and Tommy walk up the stairs into the office. I had the butcher's coats used in the case from when I worked there. On the night before the robbery I took an old Plymouth from the Club 4400 in Maryland and put it on Allison Street in Brookland. About 6:00 a.m., or 7:30 we all left the apartment in Maryland. I drove the Plymouth to 10th and E Street, Southwest. The others went in my Pontiac. They parked that car and I gave Tommy a butcher's coat and he carried a coat. Frank didn't wear a coat. I gave Frank a gun that I had in my Pontiac, a gun that was registered to me by the police department. I recognize the gun shown to me by Detective Greco as the one I gave Frank. I had previously told the others where Mr. Parks would be sitting and how to get in the place. On the morning in question after changing from my car to the Plymouth I drove the other two to Briggs and they got out and went in. I waited in the car for them until they came out. When they came out one of them said, "Let's get going." Tommy was sitting in front and Frank in the rear. We drove in and picked up my car and changed cars. Then I drove my car with the others in it to Virginia, over the 14th Street Bridge. Frank counted the money and gave me $1,600 in bills. I let

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Frank out in Alexandria and Tommy and I went back to the apartment. We did not stay long because I wasn't there when Frank came back. I spent the money just throwing it around and didn't pay off any bills with it. I have finished high school and can read and write.

Completed at 3:35 p.m., May 2, 1956. Signed, John E. Hodges.

Witnessed, Salvatore Greco and John Wilson.

116 At the bottom 5-3-56, 5:30 p.m. This statement repeated to complainant Parks in robbery squad office. Signed Harold Parks and J. Hodges.

With that, Your Honor, the government rests its case.

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CHARLOTTE RHEA HODGES

was called as a witness by the defendant * * *

Direct Examination

By Mr. Carey: * * *

Q. What is your full name, please? A. Charlotte Rhea Hodges.

Q. You are the wife of the defendant John E. Hodges? A. Yes, I am.

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Q. Do you recall anything unusual happening in your rooming quarters— A. Yes, I do.

Q. — in Chicago that day?

Tell the Court and jury what time it was and what happened. A. Between 6:00 and 7:00 on the Sunday night, April 29, three policemen came into our apartment and held guns on us and were taking my husband to the police precinct.

Q. Who was in the apartment at the time these three policemen arrived? A. When they arrived my husband and my husband's little girl were in the apartment.

Q. What specific part of the premises were you in when you first saw the police? A. Between the kitchen and the bedroom—and the living room of our apartment, our quarters.

Q. Where were you, in the hallway? A. Yes, sir.

Q. Where were you going from at the time? A. I was coming from the kitchen.

Q. To where? A. To the apartment.

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Q. Where were the three policemen when you came back from the kitchen and you were in the hallway? A.
117 One was in the hall and the others were in the room.

Q. How many were in the room? A. Two.

Q. Was the door to your room open or closed? A. When I was coming up the hall and motioned me in it was already open.

Q. Do you know of your own knowledge how the police got into your rooms? A. They walked in.

Q. What do you mean they walked? Was the door open or closed? A. To my knowledge the door, I think, was locked.

Q. Would that apply to one door or both doors? A. I know the two outside doors were locked.

Q. Did you let the police into your apartment? A. No, sir, I did not.

Q. Did you invite them in there? A. No, sir.

Q. Did you give them permission to come in? A. No, sir.

Q. You now went into the room, is that correct? A. Yes, sir.

Q. What, if anything, happened while you were in the room and your husband and child and three policemen— A. They searched the place and tore it apart.

Q. What do you mean they tore it part? Be more specific. A. They went all through our suitcases and our closets and under the furniture and under the bed and took the mattress off the bed and lifted it up and everything, just went through everything.

Q. Did they ask permission from you or your husband? A. No, sir.

Q. Did you grant them permission? A. No, sir.

Q. Did your husband grant them premission? A. No, sir.

Q. Did the police have any guns with them on this particular day? A. Yes, sir.

Q. Where were there guns, if you know? A. They were holding them.

Q. In what way? A. Pointing.

Q. Three of them or less than three? A. I don't think all three of them had them. Two of them, I believe, had guns.

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118 Q. How long were they there, would you estimate?

A. Approximately half an hour, 45 minutes, something like that.

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Q. When did you next see your husband? A. In Washington.

Q. What date was that, if you can remember? A. Friday, the fourth, Friday, May 4.

Q. When your husband left with the Chicago detectives did you ask or did they tell you where your husband was going? A. When he left the house?

Q. Yes. A. No, sir.

Q. Did you learn later where they went? A. Yes, sir.

Q. Where did they go? A. I don't know the name of the place. All I know, I was given a telephone number. I know that they had taken him to a jail of some sort.

Q. Did you make any effort or did you get in touch with the jail to which you make reference? A. Yes, sir. I called several times.

Q. What was your purpose in calling that place? A. I wanted to find out why he was taken away.

Q. Were you able to find out from anybody whom you called? A. No, sir.

Q. At any time was there any discussion by the detectives and you as to securing an attorney to represent your husband? A. No, sir.

Q. Did you ever secure a lawyer to represent your husband in Chicago? A. No, sir.

Q. How many times would you estimate that you called this place to get in touch with your husband? A. Approximately five times a day.

Q. For how many days. A. From Sunday until Wednesday.

Q. During that 15 times that you called, did you get in touch with your husband? A. No, sir. Not until Wednesday, in the afternoon.

Q. How did you get in touch with him then? A. I
119 called and he had just signed—I called and they referred me to somebody in the robbery squad and they said he had been wanted on suspicion for robbery in Washington and that he had just signed extradition papers and he was getting ready to go.

Q. Is that the first information you had where your husband was? A. Yes, sir.

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Cross Examination

By Mr. McLaughlin:

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Q. You say when you were in the apartment you did not know why the police were there? A. No, sir.

Q. How long had you been in Chicago? A. Approximately two to two and a half weeks.

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Q. Where had you been before going to Chicago? A. Florida.

Q. Where had you been before you went to Florida?

Mr. Carey: Object to that.

The Court: Overruled.

The Witness: Washington.

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Q. On April 28, 1956, when your husband was arrested in Chicago—do you remember that date? A. Yes, sir.

Q. Was his hair the same color then as it is now? A. No, sir.

Q. Who dyed his hair?

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The Witness: I dyed it.

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April 15, 1957

JOHN E. HODGES

Direct Examination

By Mr. Carey:

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120 Q. Did you, on the evening of April 29, '56, give permission or did you invite anybody into your rooms? A. No, sir. I did not.

Q. Did there come a time when, on that particular evening, when persons other than your wife and yourself and your child were in those rooms? A. Yes, sir. Chicago police were there.

It was two to start with and then a third one later on.

Q. When did you first see these Chicago policemen on your premises? A. Approximately 6:30 or 7:00. Between 6:30 and 7:30.

Q. Where were they when you first saw them? A. Coming through my door.

Q. Which door are you talking about, the first door or the second door? A. It is the door leading from the hallway to my living room.

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Q. How much time, or how long were the police in this room that you and your wife occupied? A. I would say about 20 minutes or half an hour.

Q. Tell us specifically as best you can recall what the police did if anything during the 15 or 20 minutes they were in this room in Chicago. A. They asked me if I had any guns in the house and I told them I did. And they asked where they were and I said they was in my suitcase.

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Q. Will you describe the police officers when you first saw them in your room? A. Could I describe them?

Q. Yes, what was their position? A. They came in and stood side by side with—had their guns out pointed towards me.

Q. How many of them had their guns pointed towards you? A. Two of them.

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Q. Who went with you when you left the premises? A. Three Chicago policemen.

121 Q. Where did they take you? A. They took me to—first they took me to a precinct, I guess is what you call it, a precinct, police station there, nearest my home.

Q. How far away was that from where you were living with your wife and baby? A. I imagine about a mile.

Q. Who was in the—how did you go to this precinct from the premises? Did you walk or did you ride? A. I rode in a police car. Scout car.

Q. Who else was in the police car besides you and the police officers? A. That is all.

Q. You got to the precinct and what did they do there, if anything, or what did you do? A. They wanted to know—after I got to the station they changed the story from the car. They said, "You never really know what we want you for," and I said, "Yes, I do."

He said, "Well, what is it?"

I said, "You told me about stole my car, but I got all my papers," and I want to show them the papers again. They said, "That is not what we want you for. We want you for the robbery in Washington, D.C."

I told them I didn't know anything about that.

Q. How many times were you asked that question, if you can estimate? A. Quite a few times. I couldn't estimate it.

Q. Did Officer Fitzgerald ever ask you about the robbery when you were in the precinct? A. Yes, sir.

Q. How long did you stay at this precinct? A. I just stayed there about 20 minutes, until they took me down to the main headquarters.

Q. Where were you in the precinct? A. In a cell.

Q. Were you questioned while you were in the cell in the precinct? A. No, sir, I was left alone there.

Q. Then you left this precinct, is that correct? A. Yes, sir.

Q. Where did you go then and who accompanied you? A. Two detectives and my stepfather and my wife.

Q. Where did you go? A. Down to main head-

122 quarters, being the detective bureau.

Q. About what time of the evening was it when you arrived at main police headquarters? A. It must have been about 7:30 or 8:00 o'clock, somewheres around there.

Q. What did they do to you, if anything, at the main police headquarters? A. They fingerprinted me, took pictures, and then asked me more questions about the Briggs robbery.

Q. Did Officer Fitzgerald ask you about the Briggs robbery? A. Yes, asked me if I knew anything about it.

Q. After they had taken your pictures and had you fingerprinted, what then happened, if anything? A. They put me in a cell and left me there until about 8:30 and then went into a line-up.

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Q. How long were you in the line-up? A. Around 15 or 20 minutes.

Q. Describe the line-up for the Court and jury, what was that? A. A line-up is where they get several men, I imagine about six, maybe eight men, and march you on a platform and you are in front of light and then the detectives and different people, I imagine, that have been robbed or beaten up or something, come and try and identify you.

Q. How long were you in this line-up that you are discussing? A. About 15 or 20 minutes.

Q. Were you asked any questions during the time you were in this line-up? A. In the line-up? No, sir.

Q. After the 15 minutes had elapsed, then what was done to you, if anything? A. Took me back to my cell again.

Q. What time of the evening was it then, would you estimate? A. Around 9:00 o'clock.

Q. How long did you stay in the cell before you again moved, if any time? A. Don't have any definite time but I believe about 2:00 o'clock in the morning. I was before another line-up.

Q. Were you asleep or awake when they arrived at your cell block at 2:00 o'clock in the morning? A.
123 Partially asleep. Couldn't do too much sleeping in there.

Q. This was 2:00 o'clock and where did they take you then? A. Walk to the line-up, same procedure.

Q. How long were you up in the line-up the second time? A. About 15 or 20 minutes.

Q. After the line-up was completed, where were you taken then? A. Back to my cell.

Q. About what time of the morning was it then, that you got back to your cell? A. Around 2:30.

Q. When, if again, did you leave your cell in the main headquarters after the return at 2:30 in the morning? A. About 8:00 or 8:30 in the morning.

Q. What hapened at that time? A. They took me to an office two flights down and questioned me about the robbery again.

Q. Where were you questioned about the robbery? A. in the room, some small room.

Q. Who else besides you was in that room when you were questioned about this robbery? A. Three detectives.

Q. How long a period of time would you estimate this questioning required? A. Half an hour or 45 minutes.

Q. Did they ask you about the Briggs robbery at that time? A. Yes, sir.

Q. What was your answer to the police at 8:30 in the morning, Monday, April 30? A. I didn't know anything about the robbery.

Q. Was it a series of questions or was it just one or two questions were asked of you about this Briggs robbery? A. Series of questions.

Q. Was one or more—withdraw that.

Did one or more police officer question you during the time you were in this room? A. Yes, sir. They all did, questioned me. Three that was in there.

Q. Was their questioning fast or slow? A. Fast.

Q. Were you given any relaxation at all during
124 that particular time? A. No, sir, no. Not during the questions, no, sir.

Q. Then what happened? A. Then they took me back to my cell again.

Q. What time of the morning was it then? A. About 9:00 or 9:15, 9:30.

Q. This the same cell in the main police headquarters, is that correct? A. Yes, sir, took me back to the same cell.

Q. Did you again at any time on Monday, April 30, leave your cell in the main police headquarters? A. Yes, sir. Next time was—it was directly after I went back, they took me to another line-up.

Q. Did this line-up take as much time as the previous two line-ups? A. Yes, sir, all takes about the same time.

Q. The same conditions and same atmosphere and same type of procedure, is that correct? A. Yes, sir.

Q. What time of day was it? A. Must have been about 9:30 or 10:00 o'clock.

Q. Then after that line-up was completed, the third line-up, where did you go then? A. Back to my cell.

Q. What time was it when you got back to your cell? A. A little after 10:00, I imagine.

Q. Did you again, or did you at a later time that day leave that cell block? A. Yes. Again in the evening. I imagine about 1:30 or 2:00 o'clock.

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Q. 1:30 in the afternoon, you mean, isn't that correct? A. Yes, sir.

Q. Where were you taken then? A. Taken to another line-up again.

Q. How many line-ups had you been in at this particular time, 1:30 o'clock Monday, April 30, in the afternoon? A. Three.

Q. Did this line-up take the same amount of time as the others? A. Yes, sir.

Q. Then where did you go after that line-up was
125 completed, or concluded? A. Back to my cell.

Q. This is still Monday, April 30, is that correct? A. Right, yes.

Q. Tell us when again you left the cell block in the main police headquarters. A. It was the early part of that night.

Q. What time of the night was that? Estimate it as best you can. A. Between 7:00 and 8:00.

Q. Where were you taken then? A. Back down to the room where the detectives were.

Q. Who was down in this room to which you make reference? A. Three detectives.

Q. How long did you stay in this room? A. About 45 minutes or half an hour.

Q. What occurred during that 45 minutes when you were in this room downstairs in the main police headquarters? A. They wanted to know about the Briggs robbery in Washington. Wanted to know if I did it, and wanted me to say I did it.

Q. What did you say when they asked if you were involved in the Briggs robbery in Washington, D.C.? A. I told them I didn't have anything to do with it. I wanted to go back to Washington and straighten this up myself.

Q. Who were the officers present at that time, if you know? A. No, sir. I don't know.

Q. This took about 45 minutes, is that correct? A. Yes, sir.

Q. Where were you taken after that questioning was concluded? A. Back to my cell.

Q. About what time of the evening was this then, if you know? A. I imagine about 9:00. Maybe a little before 9:00.

Q. Did you later that evening at any time leave the main police headquarters? A. No. I don't remember leaving police headquarters. No, sir.

Q. When again did you meet anyone in that main police headquarters after you were returned to the cell
126 block about around 9:00 o'clock on April 30? A. Took me before another line-up again.

Q. What time of the evening was that? A. That was in the morning around, right around 2:00 o'clock again.

Q. That would be May 1st? A. Morning of May 1st.

Q. 2:00 o'clock, Tuesday morning? A. Yes, sir.

Q. How long did you stay in that line-up? A. About 20 minutes.

Q. Were you questioned at all during that period of the line-up? A. No. I was not questioned.

Q. After that line-up was concluded in the morning of May 1st, Tuesday, what or where did you go then? A. Went back to my cell.

Q. When, if again, did you leave your cell after this line-up at 2:00 o'clock Tuesday morning, May 1? A. It was again that Tuesday morning. It was about around 8:30, I imagine.

Q. Where were you taken at that time? A. Back downstairs to the detective bureau.

Q. Same room to which you made reference earlier? A. Yes, sir.

Q. Were you questioned in this room? A. Yes, sir.

Q. For how long a period, would you say? A. About 45 minutes.

Q. By whom were you questioned and how many, if there were more than one? A. Same three detectives that had been questioning me before.

Q. Were you asked about the Briggs robbery during this questioning? A. Yes, that is what the questioning was about.

Q. What was your answer to their questioning about your involvement in the Briggs robbery? A. That I knew nothing of the Briggs robbery.

Q. This is about 8:30 o'clock Tuesday morning, is that correct? A. Yes, sir.

Q. After that questioning was completed where did you go then? A. They took me to sign extradition
127 papers. They asked me if I wanted to sign papers to go back to Washington. I told them I certainly did. They took me to sign.

Q. What was your purpose in signing this extradition paper? A. To get back to Washington here, so I could straighten this up.

Q. What time was that extradition proceedings? A. I believe about 1:00 o'clock.

Q. Tuesday afternoon? A. Yes, sir.

Q. After the extradition proceedings were completed, where were you taken then? A. Cook County Jail.

Q. Where is the Cook County jail in reference to the main police headquarters in Chicago? A. I imagine it is about eight miles.

Q. Who took you from the main police headquarters to the Cook County jail? A. Two detectives.

Q. How were you taken? A. I was taken in a scout car. Handcuffed.

Q. How long a ride was that, would you say? A. About a half an hour.

Q. Were you questioned during that half-hour ride? A. Going to Cook County jail? Yes, they asked me more about the Briggs robbery.

Q. What did you say in reply to that questioning? A. That I didn't know anything about it.

Q. What time of day was it you got to the Cook County jail? A. Around 1:30 or somewhere around there.

Q. This is Tuesday afternoon, May 1st, is that correct? A. Yes.

Q. Where were you placed in the Cook County jail? A. Cell block they have over there. One of the cell blocks. I don't remember which one it would be called.

Q. When again did you leave the Cook County jail after you were placed there on May 1st in the afternoon? A. I spent the night there sleeping on the floor. And I think it was about 12:00 o'clock when I left there.

128 Q. 12:00 o'clock when? Tuesday or Wednesday? A. Wednesday.

Q. The following day? A. Yes, sir.

Q. What do you mean you slept on the floor? A. The Cook County jail was a little bit crowded.

Q. No bed? A. No bed available. More than me sleeping on the floor. Not just me.

Q. Where were you taken on Wednesday about noon, May 2nd, '56? A. Taken back to detective headquarters.

Q. Who was present at the time that you arrived at police headquarters on May 2nd? A. Sergeant Wilson and Sergeant Greco of Washington, D.C. police.

Q. This is May 3rd, isn't it, this is the following—I am sorry, I said May 2nd. It is May 3rd. A. May 3rd, yes, sir.

Q. How long were you confronted by Officers Wilson and—

Mr. McLaughlin: It is the second.

Mr. Kilcullen: Second.

Mr. Carey: I am sorry. I do not mean to mislead you, I got the dates a little confused.

By Mr. Carey:

Q. You were taken from Cook County jail to detective headquarters? A. That is right.

Q. At the time you arrived there what time was it and who was present? A. It was, to the best of my knowledge, it was 1:00 o'clock and Sergeant Wilson and Sergeant Greco of the Washington, D.C., was there. Detectives.

Q. Were you questioned by the police at that time? A. Yes, sir. Sergeant Wilson and Sergeant Greco questioned me about the robbery.

Q. What did you say at that time? A. I told them I knew nothing of it but I signed extradition papers to come back to Washington to straighten it up.

Q. During the time from when you were arrested
129 on April 29, '56, at approximately 6:00 o'clock Sunday evening until you met Officers Greco and Officer Wilson on May 2, '56, in the afternoon, did anybody at any time advise you that you were entitled to be represented by an attorney? A. No, sir.

Q. At any time up until the time when these officers arrived, were you ever advised of your constitutional rights under the Fifth Amendment that you could not be compelled to incriminate yourself? A. No, sir.

Q. At any time did the Chicago police offer to provide a lawyer for you A. No, sir.

Q. At any time did the Chicago police give you any legal advice at all? A. No, sir.

Q. Were you able to get in touch with anybody, from the time you were arrested on April 29 at 6:00 o'clock in the evening, were you able to get in touch with anybody at all? A. No, sir. I wasn't. Wasn't allowed to use the phone.

Q. Did you have any money on you? A. I believe I had two dollars and some cents on me.

[Pause.]

By Mr. Carey:

Q. You were with the Washington police officers Wilson and Greco for how long a period of time, would you estimate, on May 2nd, '56? A. About a half an hour.

Q. After you had completed whatever questioning Officers Wilson and Greco had secured from you, where did you go then? A. Back to the cell.

Q. At the Cook County jail or the main police headquarters? A. Main police headquarters.

Q. What time of the afternoon was it, would you estimate, you returned to that place? A. I estimate it about 2:00 o'clock.

Q. How long did you stay there after this return engagement? A. Until the following day, about 12:00 o'clock.

Q. This would be May 3rd, is that correct? Then
130 where did you go? A. It would be May 3rd. Yes. Went to the airport.

Q. Who went to the airport with you and how did you

get there? A. Sergeant Wilson and Sergeant Greco of the Washington Police and the two detectives from Chicago.

Q. Were you able to have any conversation with anybody other than police officers from the time you left the main police headquarters and you got on this airplane? A. Yes, I talked to my brother.

Q. This is on the way back, is that correct? A. Yes, sir.

Q. Then you arrived in Washington, is that correct? A. Yes, sir.

Q. What time of the day was it when you arrived in Washington? A. Approximately 4:00 o'clock in the evening.

Q. Where were you taken then? A. Down to police headquarters, Municipal Building.

Q. What, if anything, occurred at the police headquarters in the Municipal Building here in the city of Washington? A. They took me to the robbery squad office and Mr. Parks of Briggs Meat Company was there. I used to work for Briggs.

They asked him if he seen anything different about me, did I look any different.

He says, "He might have lost a little weight. That is the only thing I can see." And then he says, "His hair, can't you see that is dyed?"

He looked again and he says, "It might be a shade lighter but not much different that I can tell."

Q. How long was Mr. Parks present at police headquarters when you were there? A. About 20 minutes or half an hour.

Q. Did you sign this statement here, Government Exhibit No. 2, in the presence of Mr. Parks? A. Yes, I did.

Q. Did you hear the police at any time tell Mr. Parks the circumstances under which that was secured, the amount of time you were detained in either police headquarters or Cook County jail? A. No, sir. They did not explain it.

131 Q. Were any of the circumstances surrounding the execution of this document, Government Exhibit No. 2, explained to Mr. Parks in your presence by the police officers? A. No, sir.

Q. You then left police headquarters in Municipal Center in the city of Washington, is that correct? After Mr.

Parks and the police had talked to you, is that correct? A. You say did I leave it?

Q. Did you leave? Where did you go from there? A. They took me down to the cell, down to the police cell in Municipal Building.

Q. How long did you stay there? A. I stayed there until the following morning.

Q. What time—where were you taken the following morning? A. First thing I was taken out I was taken to another line-up there.

Q. You were taken to a line-up in Municipal Center, is that correct? A. Yes.

Q. What time of the morning was it that you were exposed to this line-up? A. I believe it must have been around 8:00 o'clock.

Q. How long did you stay in that line-up? A. About 15 minutes.

Q. Then you were returned from the line-up to where? A. Back to my cell.

Q. How long did you stay in the cell before you again had occasion to leave the cell? A. Stayed there until approximately 10:00 o'clock. Then Sergeant Wilson and Sergeant Greco brought me before the Commissioner.

Q. Do you recall having a warrant served upon you on May 4, '56 [sic]? A. No warrant was served upon me.

Q. Do you recall a Deputy United States Marshal by the name of Mr. Strine serving an arrest warrant on you on May 4, '56? A. No, sir.

Q. You do not recall that at all? A. No, sir.

Q. During the time when you were in Chicago were you ever exposed to an arrest warrant or search warrant at any time? A. No, sir.

132 Q. Did the police ever advise you at any time while you were in the city of Chicago that they were in the possession of a warrant of any description authorizing them to arrest you? A. No. Right after I was arrested they said they had some warrant coming down for my arrest. They was notified but didn't have any then.

Q. Did the arrest warrants come down as the police said they would? A. I never seen them, no.

Q. Were they ever served on you in Chicago? A. No, sir.

Q. You were brought before the United States Commissioner on May 4, which was Friday? A. Yes, sir.

Q. After your arrest on Sunday, April 29, were you advised by the Commissioner, United States Commissioner for the District that you were entitled to certain basic constitutional rights? A. Yes, sir. I believe I was.

Q. Were you advised that you were entitled to be represented by a lawyer; that no obligation or any duty obtained on your part to answer any questioner until you were first represented by counsel? A. This Commissioner?

Q. That is correct. A. Yes. I am pretty sure he did. Yes.

Q. Was that the first time during the time you were in the custody of the Chicago and Washington police you were advised,—6:00 o'clock April 29, '56, until Friday, May 4, at 10:00 o'clock in the morning,—that you were entitled to be represented by an attorney? A. Yes, sir.

Q. The first time you were advised between April 29 and May 4 that under the Fifth Amendment to the Constitution you didn't have to incriminate yourself, is that correct? A. Yes, sir.

Mr. Carey: You may cross examine, Mr. McLaughlin.

Cross Examination

By Mr. McLaughlin:

Q. You knew without being advised that you did not have to incriminate yourself if you didn't want to, didn't you?

A. I wasn't familiar with the law. Never been picked
133 up in my life by the police, so I wasn't familiar with my legal rights or anything.

Q. Didn't you know that you could have an attorney if you wanted one? A. At that time I didn't think of it. No, sir.

Q. Didn't you know that? A. I figure if I wasn't scared and all that I probably would have thought of it.

Q. I didn't ask you that. My question is didn't you know at that time that you could have an attorney if you wanted one? A. Yes, I guess I did. Yes.

Q. You knew that. Now, how long had you been in Chicago prior to April 29? A. Two and a half weeks.

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Q. When the police entered your apartment they asked you about the guns, did they not? A. Yes.

Q. You told them at that time you had two guns? A. That is right.

Q. When they searched the apartment they only found one gun? A. Yes, sir.

Q. Where was the other gun, if you know? A. Right then I didn't know. Later on they said my brother had it.

Q. After the police looked in this suitcase and only found one gun then they spent the rest of the time searching the apartment for the other gun, isn't that right? A. That is right.

Q. So that if they looked in the different rooms it was for the purpose of finding this second gun, isn't that right? A. I imagine so.

Q. After—they were not able to find the gun, were they? A. The second gun?

Q. Yes. A. No, sir.

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Q. Did you have any discussion with Fitzgerald in the room about this robbery in Washington? A. That was the very first thing he said when he came into the room.

Q. What did he say? Give us his words as close as you can. A. You are wanted for armed robbery in Washington, D.C.

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134 Q. So that when you left the room in the custody of the Chicago police you knew that they were arresting you for a robbery in Washington, is that right? A. No, sir, but they told me later on it was about my car, what they were arresting me for.

Q. I say, when they brought you out of the room. A. No, I did not know.

Q. You didn't know that? A. No, sir.

Q. Not to repeat myself, but what did they say to you when they came in the room, about the robbery in Washington? A. They said I was wanted for armed robbery but they changed the charge to my car.

Q. Who changed the charge? A. I don't—Mr. Fitzgerald and one other, I don't recall which one changed it.

Q. Wasn't the talk about the automobile additional to the robbery that you were wanted for here in Washington? A. That is right.

Q. So that robbery in Washington was the first conversation and then it continued on until about a stolen car, is that right? A. That is right.

Q. What? A. That is right. Yes.

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Q. From the time that you were turned over to the police after being removed from your apartment up until the time that you saw Officer Greco and Officer Wilson, isn't it a fact that those Chicago police, if they questioned you at all, questioned you pertaining to local crimes, meaning Chicago? A. No, they never questioned me about no local crime. One time they asked me if I—"Did you pull any jobs here in Chicago?" I said, "I never pulled any job here."

They say, "You are lying. All you guys with duck haircuts are." I comb my hair—

Q. What? A. I said, "All you guys that comb your hair with the duck in the back are nothing but thieves."

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Q. When you say the Chicago police questioned
135 you about the Briggs robbery, what questions did they ask you? A. They asked me if I did it, how I did it and why I did it. When I did it. All those questions.

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Q. Did they ask you whether or not you were working on July 30 of '55? A. Yes, they did.

Q. All right. What did you tell them about that? A. Told them no, I wasn't working that day but I was employed.

Q. Where were you employed? A. Bergmann's Laundry.

Q. Did you tell them why you were not working on July 30 of '55? A. Yes, sir, I did.

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A. I told them I was in North Carolina or South Carolina at that time of the morning.

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Q. What other questions did—that you can recall—did the Chicago police ask you about the robbery here in Washington? A. Just if I did it, why did I do it. Who was with me. Come clean and go easier on you.

Q. Let—are you through? A. Yes, sir.

Q. Let me ask you this: From the questions asked by the Chicago police did they impress you as though they knew anything about this robbery in Washington? A. No. It didn't impress me. No, sir. Impressed me they were trying to get something out of me I didn't do.

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Q. When Officer Wilson and Officer Greco got there they talked to you, didn't they? A. Yes, they did.

Q. And they were in your presence for how long? A. About half an hour.

Q. Wasn't it a little longer than a half hour? A. It possible could be a little longer. Yes.

Q. Let us see what happened when Officer Greco
136 and Officer Wilson arrived. The first time you saw them was on May 2nd, is that right? A. Yes, May 2nd.

Q. That was about 1:00 o'clock in the afternoon? A. Yes.

Q. Weren't they with you until about 3:00 or 3:30? A. No. I would say they was with me, I would say approximately were with me about 1:30, I couldn't tell exactly the time, because I didn't have no watch.

Q. I appreciate that. But are you saying they were only with you for about a half-hour, is that what you are saying? A. About half an hour or 45 minutes.

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Q. * * * They first saw you, you say, about 1:30, is that right? A. About 1:00 o'clock.

Q. They talked to you, did they not? A. Yes.

Q. They discussed with you the robbery here in Washington? A. Yes, sir.

Q. Then after they discussed that with you for some length of time there was a written statement taken, isn't that right? A. It wasn't voluntary.

Q. I appreciate that. But there was a written statement taken, isn't that right? A. That is right.

Q. That statement was taken by an Officer Wilson, on his typewriter? A. Yes.

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Q. Look and see on the bottom of that exhibit, in the lower righthand corner, I believe, I think the lower left-hand corner, there, the time when you concluded taking that statement. A. Yes. Completed, 3:35 p.m., May 2.

Q. So that would you say from your recollection that they had been with you from 1:30 up until the time—would you say that correctly states the time when it was completed? A. That states the time it was concluded. Doesn't state the time it was started.

Q. No. Say 1:30, they started to talk to you, and
137 3:30 they had the statement, is that right? A. They got here "3:35 p.m.," but I wasn't talking to them that length of time. No, sir. Not from 1:30 or 1:00 o'clock to that time. Because I was only with them about half an hour or 45 minutes.

Q. The entire time? A. Yes, sir.

Q. They were able to talk to you and then reduce what you had told them in writing in 45 minutes, is that what you are saying? A. I was reading off another piece of paper what they got down there.

Q. We will come to that. My question is, they were able to talk to you and then type that up in 45 minutes, is that what you are saying? A. That is what I am saying. Yes.

Q. Wasn't any longer? A. No, I don't think so.

Q. Let me ask you this, from the first time that you saw Officer Wilson and Officer Greco, didn't they treat you all right? A. They certainly did.

Q. What? A. They sure did.

Q. They treated you like a gentleman, isn't that right? A. That is right.

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Q. After you were brought back to Washington did they have an occasion to bring you into the Southwest section of Washington, the police? A. We had to pass through Southwest section to get to police headquarters.

Q. As you passed through the Southwest section did you point out any particular place where you had parked the

car, on July 30, of this alleged robbery? A. No, I did not.

Q. Did you have any conversation at all as you passed the Southwest section of Washington in regards to any automobile? A. No, sir. None regarding any automobile.

Q. You deny that you told—in Officer Wilson's presence and Greco's, that you had pointed out a place, I believe, on Ninth Street in Southwest, where you had parked your car on July 30, of '55? A. I did not. I deny that, yes, sir.

138 Q. You deny that? A. Yes.

Q. As you drove through the Southwest section of Washington after your return from Chicago, was Officer Greco and Officer Wilson still friendly toward you? A. Yes, sir, they were.

Q. Still treating you as a gentleman, were they not? A. Ever since I met them they treated me as a gentleman.

Q. That is what you say. But you deny pointing out any particular place in Southwest where you had parked the car on July 30, is that true? A. Yes, I do.

Q. What? A. Yes, sir.

Q. After they brought you back to police headquarters, and you saw Mr. Parks there, is that right? A. That is right. Yes.

Q. And did you read this Government Exhibit to Mr. Parks? A. Yes, I was asked to read it.

Q. You were asked to read it. You didn't have any other statement there at that time to read to Mr. Parks, did you? A. No.

Q. Just this. Were you reading this to Mr. Parks as far as you were concerned as a true statement taken from you? A. I was reading it as a statement. Not as a true statement, no, sir.

Q. You were reading it as a statement of what? A. A statement I made up in Chicago.

Q. Of what? A. Pertaining to the Briggs robbery.

Q. Then you were asked to sign it again in the presence of Mr. Parks, isn't that right? A. Yes, sir.

Q. You knew what you were doing then, didn't you? A. Yes, I knew what I was doing.

Q. What? A. Yes.

Q. You knew at that time you were saying to Mr. Parks

that this was a true statement in substance, isn't that what you were doing? A. Yes. I believe so.

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Mr. Carey: The defense rests.

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139 **Closing Argument on Behalf of the Government**

Mr. McLaughlin:

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I don't deny that Officer Greco and Officer Wilson went out to talk to this defendant, and get a confession from him if possible. I do not deny that. That is what we have got the police for, to go out and talk to these people. But there is no evidence in this case about any trickery on the part of the police when that warrant was turned over to the marshal, or the Commissioner, because when that warrant is turned over to the marshal, it is the duty of the local marshal here to forward that warrant to Chicago, not the police.

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Charge of the Court to the Jury

The Court: Ladies and gentlemen, the arguments of counsel now being concluded, it becomes the duty of the Court to instruct you as to the law that should guide you in your consideration of the evidence and the determination of your verdict.

When you retire to your jury room you will take with you a copy of the indictment returned by the grand jury in this case.

The Court instructs you that the purpose of an indictment is to inform the defendant of the charge or charges that have been brought against him, and the charge that he must meet when his case comes on for trial.

An indictment is not evidence against a defendant, and it should not be regarded by you as testimony against the defendant nor as being of any probative value nor as being entitled to any weight as evidence.

In other words, it is the law of the land that every person who is charged or indicted for a crime by a grand jury must be informed of the nature of the accusation against

him so that that person will be given an opportunity to prepare his case and meet that charge when the case comes on for trial.

That has been done in this case.

The fact that the defendant in this case has been indicted by a grand jury in no way should be considered by you as evidence of his guilt. I will say more about that in just a moment.

The specific charge against this defendant is known as robbery.

Robbery is defined in the law of the District of Columbia under our Code as follows:

> Whoever by force or violence, whether against resistance or by sudden and stealthy seizure or snatching or by putting in fear, shall take from the person or immediate actual possession of another anything of value is guilty of robbery.

The specific charge against this defendant returned by the grand jury, which I said to you a moment ago, is not to be considered as evidence against the defendant, but it is brought pursuant to the section of the Code of Laws of the District which I just read to you.

The charge—and you have heard this before—is that on or about July 30, 1955, within the District of Columbia, Thomas A. Stramer, John E. Hodges and Frank A. Hodges, by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear stole and took from the person and immediate actual possession of Harold P. Parks property of Briggs and Company, a body corporate, of the value of $4,950, consisting of $4,950 in money.

The Court is not going to review the testimony because I know it is clear in your mind as to what transpired. But I might call your attention to this. This is an indictment brought against three people, two of whom are not on trial; the only one on trial is the defendant, Mr. Hodges.

You must have in mind certain elements of this offense. The indictment itself says whoever by force and violence and against resistance and by sudden and stealthy seizure and snatching.

If the crime was committed—and it is for you to decide whether or not a crime was committed—in any one of those ways mentioned in the indictment, that would be sufficient upon which to base a verdict of guilty. It doesn't have to be committed in all of the ways indicated in the indictment.

141 You have here the testimony of Mr. Parks as to what transpired when two men came into the place of business.

The defendant, according to the evidence, was not present at the time of the actual commission of the crime, but the Court charges you that a person who, although not personally present at the commission of a crime, who advises and assists and connives at the offense or aids or abets the principal offender, is a principal and is just as guilty as those who were present and committed the offense.

I am not indicating the defendant was there or he was not there. I am simply setting forth to you what the law is with respect, if you so find, to persons aiding and abetting and assisting in the connivance or perpetration of an offense.

There is no direct evidence as counsel have indicated to you in their arguments to you as to the defendant being actually present at the time Mr. Parks was alleged to have been held up at the point of a gun.

The Court tells you that frequently proof of guilt in a criminal case consists entirely of what is known as circumstantial evidence. Circumstantial evidence is evidence of circumstances from which a defendant's guilt or innocence may be inferred by the jury.

At times, in fact, if circumstantial evidence is sufficiently strong it may be even more convincing than direct evidence, and a witness may make a mistake in identifying a person whom he saw. His memory may be inaccurate or he may be intentionally fabricating a story.

On the other hand, circumstances speak for themselves and if they are strong enough and unambigous enough at times irresistable lead to a definite conclusion.

The Court further instructs you that a defendant—that includes this defendant—is presumed to be innocent and the burden of proof is upon the government to prove him guilty beyond a reasonable doubt.

Unless the government sustains this and proves beyond a reasonable doubt that the defendant has committed every element of the offense charged, the jury must find him not guilty.

142 The elements would be that he participated either actively or aided and abetted as I have identified that part to you in the commission of this offense; that this money which belonged to the Briggs Company was taken by force or by putting Mr. Parks in fear; that it was of the value of so many hundreds of dollars, you heard in the case. They must have the specific intent to commit the crime. That intent must be present at the time the crime was allegedly committed.

As I said to you a moment ago, the burden of proof is on the government to prove a defendant guilty beyond a reasonable doubt, but not beyond all doubt whatsoever.

In other words, the government must prove the defendant guilty to a moral certainty and not to an absolute certainty.

As its name implies, a reasonable doubt is a doubt for which you can give a reason to yourself, a doubt based on reason and not just a whimsical conjecture or some capricious speculation.

I think I can explain to you the meaning of the phrase "reasonable doubt" in simple, everyday language.

Proof beyond a reasonable doubt simply means this. If after an impartial comparison and consideration of all the evidence you can say to yourselves that you are not satisfied of the defendant's guilt, then you have a reasonable doubt. But, if after such impartial comparison and consideration of all the evidence you can truthfully say to yourselves that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt.

In other words, proof beyond a reasonable doubt simply means that the proof must be such as will result in an abiding conviction of the defendant's guilt on your part and in your mind, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs.

I believe this particular panel of you 13 jurors are serving on one of our civil courts. I don't know whether

any of you have ever been instructed yet in connection with any case, but there is a difference between proof required in a civil case and a criminal case.

In the civil case the Court instructs the jury that the plaintiff, the party who asserts the affirmative in a civil action, has the duty of establishing to the satisfaction of the jury the particular act, we will say, of negligence alleged in the complaint by a fair preponderance of the evidence, or by the weight of the evidence.

Now the degree of proof required in a criminal case, as you heard, is different. It requires before you can convict—not only this defendant but any defendant—proof beyond a reasonable doubt. And if you have a reasonable doubt you must give the defendant the benefit of the reasonable doubt and acquit him.

In determining whether the government has established the charge against the defendant, you must consider and weigh the testimony of all the witnesses who have appeared before you. You and you alone are the sole judges of the credibility of the witnesses.

In other words, you must determine which witnesses to believe and to what extent to believe them.

In deciding how much weight to attach to the testimony of a witness you may consider the demeanor of the witness upon the witness stand, his manner of testifying, whether the witness impresses you as having an accurate memory and recollection; whether the witness impresses you as a truth-telling individual; and whether the witness has an interest in the outcome of the case.

You may consider all these factors as well as any other matters which may seem to you to have a bearing on the question as to whether the witness is telling the truth or telling a falsehood.

The law further says that if you believe that any witness—and that includes witnesses produced by the government or by the defendant, the defendant himself, that includes everybody that testified in this case, or any other criminal case—if the jury believes that any witness has knowingly testified falsely as to any material fact or facts in issue the truth of which that witness, he or she, cannot have been reasonably mistaken about, then the jury may, if it sees fit, disregard any part of that

witness's testimony or the entire testimony of that witness if you see fit to do so.

As I said before, you are the sole judges, you are the exclusive judges of the facts in the case and it is the duty of the Court to make known to you the law of the case and it is the duty of the jurors to take the law of the case from the Court.

You are admonished not to permit your judgment or reason or intelligence to be swayed by sympathy, bias or prejudice or ill will for or against either the defendant or the government; you are not to be influenced by your feelings and emotions. Your verdict is to be reached in accordance with the solemn oath that you took that you would well and truly try this case and a true verdict render in accordance with the law as given to you by the Court.

You must consider this matter deliberately and carefully and in the light of the instructions of law which I have just given you.

In reaching your conclusion you must use the same common sense, the same approach, the same intelligence which you would apply in determining any important matter that you have to decide in the course of your own affairs.

The defense submitted by the defendant in this case is what is known as an alibi defense. That is that on the morning of July 30, '55, when it is alleged that two men went into the Briggs Company and held up Mr. Parks at the point of a gun and took the money, that he was at some place other than that location.

You will remember the testimony as given by the defendant. If after a fair and impartial consideration of all of the evidence the jury has a reasonable doubt that the defendant was at the place where the crime was committed— he was not physically inside the premises—if he was nearby lending whatever aid and assistance he wanted to or connived in the offense or planned the offense or any of those things, if you have a reasonable doubt that he was some other place and never did the things that the government claims he did, then of course you would give him the benefit of that doubt if you have such a doubt and acquit him.

I will also say again that the statement that was alleged to have been made by Officer Wilson in the presence of the defendant, after Mr. Wilson arrived in Chicago, to the effect, I believe he said that a man named Mr. Stramer had made a confession—you are to disregard that entirely because as I said before, you cannot admit evidence of what one person said out of the presence of a defendant. I think I have explained that to you before and I caution you to disregard that statement.

As I have told you before, during the argument of counsel, and I want to say that the defendant has been represented by very able and experienced counsel, and also the government, you have listened to their arguments, they serve a very useful and important function in any case, particularly in criminal cases. Their arguments are not to be considered as evidence. You must rely on your own recollection of what the witnesses testified, and give their argument such weight as you think should be given to their arguments in connection with your own recollection of the testimony in the case.

If I have said or done anything during the course of this trial—I hope I haven't—either my motion or tone of voice or anything of that nature which indicates to any one of you jurors how I may be feeling about this case, that is of no importance, because the facts in this case are solely for you to consider. You are the sole judges of the facts and the credibility or truthfulness of the witnesses. It makes no difference what the Court may think and I have tried not to express any opinion one way or the other.

If you think I have done so by any actions, you are to disregard that entirely and arrive at a verdict that will do justice to your conscience and oaths as jurors.

Look at this case objectively. Use that same common sense that was given to you when you were born and apply it to the facts in this case without sympathy or prejudice or bias for either party.

146 Your verdict must be unanimous. That is, all 12 of you must agree upon a verdict when you get to your jury room. I am going to excuse you now until 2:00 o'clock.

You will select a foreman and begin your deliberations. If you arrive at a verdict you will notify the marshal who

will be seated outside your room and he in turn will notify the Court.

I am going at this time to excuse the alternate juror, No. 12, and I also want to thank you for the kind attention you have given the case.

I don't know whether you know this or not, but the reason you were selected in the case was if some one of the other jurors became ill during the trial you would be ready to take their place or in case they were disabled or disqualified for any reason.

I will ask the marshal to take the jury to lunch now.

I will ask you to keep in mind the admonition until you get to your jury room when you begin your deliberations.

Are ther any objections by counsel?

Mr. Carey: May we approach the bench?

[At the bench:]

Mr. Carey: Your Honor, I think one thing, I do not think you charged the jury they were to determine whether the confession was voluntary or involuntary.

The Court: I am sorry.

Mr. McLaughlin: That is what I was going to say.

[In open court:]

The Court: Ladies and gentlemen, I overlooked something and I have been reminded by the attorneys.

The defendant, according to the testimony of one of the police officers, Mr. Wilson, made a written confession to him and admitted his participation in the crime.

The jury is instructed that a confession is evidence only against the defendant making a confession.

147 The law admits a confession in evidence if it is freely and willingly made and a confession freely and willingly made is evidence of great importance and is worthy of serious consideration because human experience shows that ordinarily a confession freely and willingly made is likely to be a reliable one.

Ordinarily a person does not admit that he has committed a crime unless that admission is true. That is, that has been the result of human experience.

The law does not admit, however, a confession taken by duress, by coercion, by force, or as a result of an induce-

ment or as a result of getting a person to make him confess.

In that connection the Court further instructs you that a confession, if you so find this confession to have been, obtained by these means, must be rejected and disregarded by the jury.

Human experience has also shown that it has happened that persons have admitted the commission of a crime when they have not in fact committed it, as a result of force which has been exerted against them.

In other words, I repeat, human experience has shown that it has happened a person has admitted the commission of a crime which they have not in fact committed, as a result of force exerted against them.

If you find that the defendant Hodges' confession was made under duress and obtained by coercion and force or by inducement or promises or by baiting him, then you must disregard the confession.

If the jury has a reasonable doubt as to whether the confession was voluntary, then they must reject it.

In other words, you are the exclusive judges of all of the facts surrounding this alleged confession which the officer said he obtained from the defendant.

If it was a voluntary confession as I have explained the meaning of that word, then you may accept it. If it was involuntary or made for any reason which I have included in the charge, then it must be rejected.

Is that satisfactory to counsel?

148 Mr. Carey: Yes.

The Court: Any objection to any part of the charge by either counsel?

Mr. McLaughlin: No.

Mr. Carey: No.

[Whereupon the jury retired to consider of its verdict.]

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(File endorsement omitted)

157 IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14683

JOHN E. HODGES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Opinion—December 30, 1959

Mr. Quinn O'Connell, with whom *Mr. Henry B. Weaver, Jr.*, (both appointed by this court) was on the brief for appellant.

Mr. Louis M. Kaplan, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, and *Carl W. Belcher*, Assistant United States Attorney, were on the brief, for appellee. *Mr. Harold D. Rhynedance, Jr.*, Assistant United States Attorney, also entered an appearance for appellee.

Before EDGERTON, WILBUR K. MILLER and FAHY, *Circuit Judges.*

FAHY, *Circuit Judge:* Appellant was convicted of robbery April 15, 1957. The principal evidence was a confession he had signed. Counsel represented him and no
158 question is raised as to the adequacy of his assistance. Appellant took no appeal. Three months later he filed a motion under 28 U.S.C. § 2255 (1958) to vacate the sentence imposed as a result of his conviction. The motion contained allegations as to the manner in which the confession was obtained which, if true, would have rendered the confession inadmissible because the result of coercion. The motion was denied. Preparation of an appeal from this denial disclosed that the notes of the court reporter covering the hearing on the section 2255 motion could not be found. Appellant accordingly moved in this court to remand for a new section 2255 hearing. We denied this motion but ordered preparation of the transcript

of the proceedings of the trial itself as a supplemental record on the appeal. This transcript is now before us and shows that at the trial the question of the admissibility of the confession was first the subject of a hearing outside the presence of the jury. On the basis of evidence thus adduced as to the manner in which the confession was obtained the court ruled it admissible, subject to the jury's duty to reject it should they find that it was involuntary. The evidence respecting the obtaining of the confession was then adduced before the jury itself. Under instructions as to which no question is raised the jury convicted appellant, concluding, as we assume, that the confession was voluntary.

Appellant contends that the evidence as to the manner in which the confession was obtained shows as a matter of law that the confession was coerced and consequently that he is entitled to have his sentence set aside on this collateral attack under section 2255, notwithstanding no appeal was taken from the judgment of conviction. We assume *arguendo*, without ruling on the question, that the confession was involuntary as a matter of law.

The Supreme Court has held several times that in state court trials the use of a coerced confession violates the rights of the accused protected by the Fourteenth
159 Amendment, and there can be no question that the use of such a confession to convict in a federal trial offends the Fifth Amendment. In *Leyra* v. *Denno*, 347 U.S. 556, a state conviction obtained in such circumstances was set aside in federal habeas corpus proceedings initiated subsequently to final state action sustaining the conviction. Other convictions so obtained, reviewed and reversed by the Supreme Court on writ of certiorari to or on appeal from the highest state court, rather than in habeas corpus proceedings as in *Leyra*, also have been characterized as violative of the Fourteenth Amendment. *Spano* v. *New York*, 360 U.S. 315; *Payne* v. *Arkansas*, 356 U.S. 560; *Malinski* v. *New York*, 324 U.S. 401; *Lisenba* v. *California*, 314 U.S. 219. A feature of each of these cases, however, including *Leyra*, is that the trial was in a state court and had been reviewed on appeal by the highest court of the state without correction of the erroneous admission of the confession.

Section 2255 is in terms applicable to a motion to vacate a sentence by a federal court upon the ground that it was "imposed in violation of the Constitution or laws of the United States," but the constitutional ground is phrased in the third paragraph of the section as "such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack." Moreover, no distinction is made in the language of the section between violation of the "Constitution" and violation of "laws of the United States," thus seeming to expose a conviction on either ground to collateral attack in like procedural circumstances. And we have found no case in which collateral review by motion under section 2255 or by habeas corpus has been had of a conviction in a District Court of the United States on the basis of a coerced confession followed by no appeal to a United States Court of Appeals;[1] although the Supreme Court in addition to cases above referred to, has said on other occasions that collateral attack is available to set aside a sentence resting upon any infringement of a constitutional right. In *Bowen* v. *Johnston*, 306 U.S. 19, where, however, the question was one of jurisdiction of the trial court, the Court said that if it were found that the court had no jurisdiction "or that in its proceedings . . . constitutional rights have been denied, the remedy of *habeas corpus* is available." 306 U.S. at 24. And the opinion in *Sunal* v. *Large*, 332 U.S. 174, 182, infers that habeas corpus is available where the error trenches "on any constitutional rights of defendants" or involves "the jurisdiction of the trial court," the Court there holding, however, that the alleged error, not deemed of a constitutional or jurisdictional character, was for review on direct appeal and not by habeas corpus. And see *Darr* v. *Burford*, 339 U.S. 200, 206.

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It would seem clear that a failure to appeal from a conviction does not always save it from collateral attack on a constitutional ground, or indeed on other ground where the

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[1] Cf. *Thomas* v. *United States*, ... U.S. App. D.C. ...., ... F. 2d .... (No. 14941, Oct. 15, 1959), in which a coerced plea of guilty was held subject to collateral attack by motion in the nature of coram nobis.

court is convinced justice requires a remedy, though sought collaterally.[2] In other words the Great Writ, and section 2255, are not to be imprisoned within an ironclad rule stated in terms of collateral relief not being a substitute for an appeal.[3] In our treatment of the subject in
161 *Smith* v. *United States*, 88 U.S. App. D.C. 80, 187 F. 2d 192, *cert. denied*, 341 U.S. 927, however, we held that where the violation of constitutional right is in the admission of evidence the error ordinarily must be corrected by direct appeal:

> Such admission alone does not result in the denial of a constitutional guaranty so long as the error is subject to correction on appeal and there is no indication of any deterrent to appeal, such as lack of counsel. Accordingly, in such circumstances the method of correction must be direct, not collateral.

88 U.S. App. D.C. at 85, 187 F. 2d at 197. And see *Adams* v. *United States*, 95 U.S. App. D.C. 354, 222 F. 2d 45. Our problem now is whether this position should be abandoned.[4]

In the coerced confession cases the Supreme Court has required the prisoner first to exhaust his state remedies, including all appellate remedies, before applying to a federal court for a writ of habeas corpus. *Darr* v. *Burford*, 339 U.S. 200. *Darr* was based on 28 U.S.C. § 2254 (1958) which for prisoners in custody pursuant to the judgment of a state court is the counterpart of section 2255 for per-

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[2] See discussion of the problem in the separate dissenting opinions of Mr. Justice Frankfurter and Mr. Justice Rutledge in *Sunal*.

[3] "The rule requiring resort to appellate procedure when the trial court has determined its own jurisdiction of an offense is not a rule denying the power to issue a writ of *habeas corpus* when it appears that nevertheless the trial court was without jurisdiction. The rule is not one defining power but one which relates to the appropriate exercise of power. . . . [T]he rule is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Bowen* v. *Johnston*, 306 U.S. at 26-27.

[4] We noted in *Smith* that the uniform course of decisions in the Circuit Courts conformed with our disposition of that case.

sons under federal sentence.[5] Principally on grounds of comity *Darr* construed section 2254 to necessitate a
162 petition for certiorari to the Supreme Court where there has been a denial of relief by the highest court of the state, before the federal District Court could entertain a petition for writ of habeas corpus, absent exceptional circumstances.

Although section 2255 contains no provision for exhaustion of federal appellate remedies before a collateral attack upon a federal sentence may be sustained, the orderly administration of criminal law by the federal courts, of somewhat comparable rank with comity, is involved in such an attack when no appeal has been prosecuted from the judgment of conviction and no reason advanced for the omission to appeal. We remain of the view that the right of appeal may not be abandoned and resort had to section 2255 whenever the conviction rests on evidence admitted at the trial in violation of a constitutionally protected right. Otherwise the appellate process to cure error in the admission of evidence would be *pro tanto* atrophied. One under sentence by a federal court in such a case could simply ignore his right of appeal and resort to section 2255 at any time, and if he could do this for violation of the "Constitution" he could do the same for violation of the "laws of the United States," for these are bracketed on an equal footing in the context of section 2255. Yet that section is not an enlargement of the area of collateral attack theretofore available by habeas corpus; that is to say, the constitutional ground referred to in section 2255 remains one arising only in such circumstances as to be assertible collaterally rather than directly,[6] as is the case

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[5] Section 2254 expressly provides that a writ of habeas corpus will not issue "unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

[6] Thus the third paragraph of section 2255, as we have indicated, states: "If the court finds that . . . there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack," the prisoner is entitled to relief.

when the ground asserted is a violation of the "laws of the United States."

163 We are therefore constrained in the present status of Supreme Court decisions to hold that in this case collateral attack is not available in the complete absence of any attempt to excuse the failure to appeal, and in the absence also of a showing that collateral remedy is required in order to avoid manifest injustice. We add these qualifications in deference to the flexibility to be accorded section 2255 consistently with the purpose and tradition of the Great Writ, of which section 2255 is a complement. See *Darr* v. *Burford*, 339 U.S. 200, 219 (dissenting opinion of Mr. Justice Frankfurter).

No reason is advanced by appellant for his failure to appeal from the judgment of conviction, and the facts of the case do not lead us to hold that, nevertheless, justice requires that appellant should be granted relief.

Affirmed.

WILBUR K. MILLER, *Circuit Judge*, concurs in the result but not in the opinion.

(File endorsement omitted)

196 IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(Title omitted)

Before: Prettyman, Chief Judge, Edgerton, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, in Chambers.

Order In Banc Granting Petition for Rehearing—April 15, 1960

Upon consideration of appellant's petition for rehearing, it is

ORDERED by the court, sua sponte, that the petition for rehearing is granted and that this case is set for rehearing before the court in banc. Counsel are requested to discuss the following question: Whether appellant, either in the affidavits filed in this court or otherwise, has made such a

showing as to entitle him to a hearing in the District Court on the question whether, notwithstanding his failure to appeal directly from the judgment of conviction, he is entitled to a hearing in the District Court on the right he claims to attack collaterally under 28 U.S.C. § 2255 (1958) the validity of the judgment of conviction on the basis of the admission in evidence of an alleged coerced confession.

Counsel will be allowed ten days to file supplemental memoranda directed to the above question.

Per Curiam.

Dated: April 15, 1960

(File endorsement omitted)

197 IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(Title omitted)

Before: Edgerton, Wilbur K. Miller and Fahy, Circuit Judges, in Chambers.

Order Vacating Judgment of December 30, 1959—April 15, 1960

It appearing that this case has been set for hearing before this court in banc, it is

ORDERED by the court, sua sponte, pursuant to Rule 27 (d), that the judgment of this court entered herein December 30, 1959, is vacated.

Per Curiam.

Dated: April 15, 1960

(File endorsement omitted)

198 IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14683

JOHN E. HODGES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Opinion on Rehearing En Banc—July 21, 1960

Mr. Quinn O'Connell, with whom *Messrs. Henry B. Weaver* and *Hershel Shanks* (all appointed by this court) were on the brief, for appellant.

Mr Carl W. Belcher, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, and *Louis M. Kaplan*, Assistant United States Attorney at the time the brief was filed, were on the brief for appellee. *Mr. Harold D. Rhynedance, Jr.*, Assistant United States Attorney, also entered an appearance for appellee.

Before PRETTYMAN, Chief Judge, and EDGERTON, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN, and BURGER, Circuit Judges, sitting *en banc*.

PER CURIAM: This is an appeal from a judgment of the District Court, declining to vacate appellant's sen-
199 tence of imprisonment for crime, under 28 U.S.C. § 2255 (1958), as against appellant's allegation that his conviction was obtained by reason of a coerced confession introduced at his trial. The case was first heard by a division of the court, and the judgment was affirmed on December 30, 1959. Later, appellant filed a petition for rehearing by the division. Reargument was had before the court *en banc*, on our own motion. A majority of the full court now affirms the judgment of the District Court.

So ordered.

WASHINGTON, *Circuit Judge*, with whom PRETTYMAN, *Chief Judge*, and WILBUR K. MILLER, DANAHER, BASTIAN and BURGER, *Circuit Judges*, join: Speaking for a majority of the division which first heard this case, Judge Fahy issued on December 30, 1959, an excellent opinion with which in most respects I am glad to agree. To the extent, however, that that opinion may be said to adopt a theory of "excusable neglect" akin to that later rejected by the Supreme Court in *United States v. Robinson*, 361 U.S. 220 (1960; direct appeal), I am constrained to disagree with it, as well as with the supplemental opinion Judge Fahy has prepared with respect to the petition for rehearing.

I think it may be well, first of all, to say a word about some of the practical problems presented by petitions under Section 2255, with particular reference to those petitions which seek to challenge the admissibility of confessions. In a substantial portion of the felony cases tried in the United States District Court for the District of Columbia, where trial is had after a plea of not guilty, confessions or admissions made by the accused to the police are offered in evidence by the prosecution. Counsel for the accused commonly attack such confessions or admissions as coerced, or as the product of illegal detention. Full opportunity is ordinarily given, in a hearing held in the jury's absence, to develop all the circumstances of the accused's arrest, detention, interrogation, and arraignment. Police officers are examined and cross-examined. The accused commonly takes the stand to give his version of the occurrences in question. Counsel urges legal argument on the court. At length, the court decides whether or not to allow the confession to go into evidence before the jury. If the judge decides to do so, his task is not ended. He must, if the case finally goes to the jury, give them proper instructions. And if a verdict of guilty results, he is empowered to set aside the verdict if he is persuaded that it is not supported by the evidence, or is otherwise defective—as, for example, where he concludes that he erred in allowing the confession to be admitted. But, if the verdict is allowed to stand, and sentence in due course follows, there is still the right and privilege of appeal.

All of these safeguards are made available to the accused to protect him from being convicted on the basis of a coerced confession. Failure of the trial judge to give necessary protection to the rights of the accused at any step of this process may be reviewed on appeal—on a record which is fresh in the minds of all concerned. If a new trial is ordered, it can ordinarily be begun without delay. Witnesses are usually still available. But if an appeal is not taken, and the accused files a petition under Section 2255 some months or years later, the situation is very different. The accused—now a prisoner—may not be impressed with the risk of committing perjury in framing his petition. He is frequently advised by a "jail-house lawyer," who may encourage him to embroider his story, or to attack the good faith and diligence of his trial counsel.

The Supreme Court has to face a similar problem, in dealing with *in forma pauperis* petitions for certi-
201 orari—now running at the rate of many hundreds a year (772 in 1958). Mr. Justice Douglas says that the "claims made are often fantastic, surpassing credulity. They are for the most part frivolous."[1] He adds that over the past 21 years the rate at which such petitions were granted was less than 4%.[2]

The problems faced by the District Court and this court in dealing with petitions under Section 2255 are of like nature. It may be that less than 4% of such petitions ultimately prove meritorious. Yet we must scrutinize all of them with care, not only because it is our duty under the statute but because we are traditionally obligated to give relief in habeas corpus—for which the statute provides at least a partial substitute—in cases where a clear miscarriage of justice has occurred. But, absent a showing of a real miscarriage of justice, I think we must hold to the general rule that the admission of a confession at

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[1] Douglas, *The Supreme Court and its Case Load*, 45 CORNELL L.Q. 401 at 407.

[2] *Id.* at 407. Presumably an even smaller percentage represented ultimate success by the petitioner in gaining relief from conviction or punishment.

a plenary trial[3] is not subject to attack under Section 2255 on the ground that the confession was coerced, or was given during a period of illegal detention. Allowing such collateral attacks to be made would permit the reopening of many of the most lengthy and hotly contested criminal trials—at a time when recollections may have dimmed and witnesses may have disappeared.

In his petition for rehearing, Hodges says that he did not take a direct appeal from the judgment of conviction because he did not know he had only ten days within which to appeal, and because he was taken to jail after being sentenced by the District Court and his counsel had no opportunity to advise him about taking an appeal. Assuming arguendo that this constituted "excusable neglect,"[4] it does not extend the time for taking a direct appeal, *United States* v. *Robinson*, 361 U.S. 220 (1960); *a fortiori* it cannot expand the scope of relief grantable under Section 2255 into that available on direct appeal.

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Of course, if the Government has obstructed the accused in his efforts to take a direct appeal, that is another story. Cf. *Dowd* v. *Cook*, 340 U.S. 206 (1951). But mere neglect in taking an appeal—excusable or not—should not open the door to the bringing of collateral attack under Section 2255, in a case where it would not otherwise lie. Such a view would greatly hamper the courts in their task of rendering prompt justice in current cases, and would tend to revive the "intolerable uncertainty and confusion"

[3] Where no such trial is held, and the accused is convicted on the basis of a coerced plea of guilty, the situation is entirely different; collateral attack is of course available. *Thomas* v. *United States*, 106 U.S. App. D.C. 234, 271 F. 2d 500 (1959).

[4] However, this accused's knowledge of the law can hardly be the subject of any meaningful judicial inquiry. As to the alleged lack of opportunity to consult with counsel, the record shows that the verdict of guilty was rendered on April 15, 1957, and that sentencing took place on May 3, 1957. Hodges was represented at the trial and at sentencing by two attorneys, both apparently retained by him. If either had perceived any substantial basis for an appeal, it is almost incredible that Hodges would not have been so advised prior to May 13, the last day for taking an appeal.

which the Supreme Court was seeking to end in its decision in *United States* v. *Robinson*, *supra* at 230. While the concluding footnote in that case reminds the bench and bar that "there are a number of collateral remedies available to redress denial of basic rights," including the remedy under Section 2255, the Supreme Court could hardly have intended by this to undermine its decision in *Robinson*, or to expand a collateral remedy into a substitute for an appeal, in a case (like the present)
203 where no basic right has been denied, within the principles announced in *Sunal* v. *Large*, 332 U.S. 174 (1947), and other governing decisions. The scope of relief grantable under Section 2255 or in habeas corpus is not to be diminished by failure to appeal, but neither is it to be increased.

FAHY, *Circuit Judge*, with whom EDGERTON and BAZELON, *Circuit Judges* join, *concurring in part, dissenting in part*: Upon the basis there discussed I adhere to the opinion of the majority of the division rendered December 30, 1959, reprinted as an appendix to this opinion. I accordingly concur in the present per curiam opinion of the court en banc insofar as it approves the opinion of the division. In view of matter presented on the petition for rehearing I would not now affirm, however, but would vacate the denial by the District Court of Hodges' motion under 28 U.S.C. § 2255, and would remand for further proceedings consistently with the views I now express.

The opinion of December 30, 1959, assumed *arguendo* that the conviction was due to a coerced confession. Nevertheless we held the sentence immune to collateral attack notwithstanding decisions of the Supreme Court that a conviction so obtained violates constitutional rights. We so held because Hodges had failed to appeal from his conviction and in his later section 2255 motion had advanced no reason for the failure. The case was not one requiring collateral attack to be entertained to remedy manifest injustice.

In his petition for rehearing Hodges brings to our attention that in earlier proceedings in this court he sought to supplement the record on appeal to show why he had failed to appeal the conviction. The significance of this showing was not urged in briefs and arguments on the

hearing which led to the opinion of December 30,
204 1959, no doubt because another division of our court had denied the motion to supplement the record.

The papers filed with that motion, and relied upon in the petition for rehearing, include two affidavits, one by Hodges' trial counsel and one by Hodges himself. These state in substance that after he was sentenced Hodges was promptly taken away without opportunity for his counsel to advise him with respect to an appeal, and that he did not know he had only ten days within which to appeal. The sentencing court did not itself advise him of his right to appeal, no doubt mistakenly assuming that counsel would do so. Had Hodges not been represented by counsel the sentencing court, in accordance with the following requirement of Rule 37(a)(2), Fed. R. Crim. P., would have advised him of his right to appeal:

> . . . When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. . . .

In my opinion appellant is now entitled to an opportunity in the District Court to establish the truth of the allegations of the affidavits and if able to do so I think he would then be entitled to a hearing on his motion under section 2255. Should the District Court, as a result of such a section 2255 hearing, find that the confession was involuntary as matter of law, then the court should set aside the conviction and order a new trial. A transcript of this hearing should be preserved for possible appellate proceedings.[1]

As pointed out in the opinion of December 30, 1959, a conviction due to a coerced confession is due to a
205 violation of a constitutional right and collateral attack is ordinarily available to rectify the error.

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[1] In the section 2255 proceedings heretofore had the District Court found, after an oral hearing, that the confession made to the Metropolitan Police Department was voluntary, but we are not able to review that finding on appeal because the record of the oral hearing is lost.

Failure to appeal a conviction so obtained should not bar relief by collateral attack when the accused did not know he must appeal within ten days and was not advised by court or counsel of his right to appeal.

If the affidavits are true then in all substance Hodges when sentenced was in the same position as one required by Rule 37(a)(2) to be advised by the court of his right to appeal and on request to have the clerk prepare and file a notice of appeal. The difficulties which it is said may be caused by permitting subsequent collateral challenge in such a situation could easily be avoided by the use of the simple procedure set forth in this Rule.

United States v. *Robinson*, 361 U.S. 220, holds that the filing of a notice of appeal within ten days is a jurisdictional requirement and, therefore, that the time to appeal is not enlarged by a showing of excusable neglect. But it does not follow, and I do not agree, that failure to appeal within ten days bars relief, by motion later filed under section 2255, in respect to every matter which could have been raised by timely direct appeal. The history of habeas corpus and section 2255, as well as the *Robinson* case itself, is to the contrary. *United States* v. *Robinson*, *supra at* 230, n.14.[2] We are not here concerned with
206 an attempt to appeal out of time because of excusable neglect. We are here concerned with a collateral challenge to a sentence. The time limitation for appeal is rigid and jurisdictional, but the scope of review is as broad as the record itself. In contrast, there is no time limitation applicable to a section 2255 motion, but the scope of re-

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[2] The *Robinson* footnote reads as follows:

> The allowance of an appeal months or years after expiration of the prescribed time seems unnecessary for the accomplishment of substantial justice, for there are a number of collateral remedies available to redress denial of basic rights. Examples are: The power of a District Court under Rule 35 to correct an illegal sentence at any time, and to reduce a sentence within 60 days after the judgment of conviction becomes final; the power of a District Court to entertain a collateral attack upon a judgment of conviction and to vacate, set aside or correct the sentence under 28 U.S.C. § 2255; and proceedings by way of writ of error *coram nobis*.

view is narrow. The motion may be filed "at any time" —though I suppose it would not be entertained, as such, but would be treated as an appeal, if filed during the appeal period of ten days. Its limitation is other than that of time; it brings under review only error of a constitutional, jurisdictional or otherwise fundamental character, such as the admission in evidence of a coerced confession, held by the Supreme Court time and again to violate constitutional rights. See *Spano* v. *New York*, 360 U.S. 315; *Payne* v. *Arkansas*, 356 U.S. 560; *Leyra* v. *Denno*, 347 U.S. 556; *Malinski* v. *New York*, 324 U.S. 401; *Lisenba* v. *California*, 314 U.S. 219. When in our opinion of December 30, 1959, we adhered to a limitation, not contained in section 2255 itself, but deemed to inhere in the orderly administration of justice, namely, that even in case of such fundamental error collateral attack is unavailable when no appeal was taken and no reason appears for failure to appeal, we went as far I think as the courts can possibly go in restricting the availability of review under section 2255. If the accused did not know and was not advised of his appeal rights, the adjudicatory doors opened by Congress in enacting section 2255, like the avenues available under the Great Writ, should not be closed and persons left in prison as a result of violation of their constitutional rights.

In most cases the question of admissibility of a confession is settled by the decision on appeal. We are here concerned, however, with the rarer case of (1) no direct appeal, (2) a later collateral attack, (3) on the basis of a coerced confession, and (4) good reason shown for failure to appeal. When this combination occurs I cannot
207 agree the courts must say to the person imprisoned under a basically invalid sentence that the law affords no remedy because, although he did not know and was not advised of his appeal rights, he should have appealed anyhow. Nothing in the history of the Great Writ or of section 2255 leads me to this answer. Rather, the contrary. Moreover, on the practical aspects of the matter, those under sentence are not likely to think they can gain an advantage by not appealing in time and later resorting to collateral attack. The scope of review is narrow, and time is not on their side.

Congress by section 2255 enacted an enlightened statute to permit at any time the correction of fundamental error which holds a person in prison. As we have seen, a conviction by the use of a coerced confession rests upon fundamental error. The usual way to seek correction is by appealing from the conviction. Failure to take that course precludes collateral attack unless good reason appears for the failure. Good reason does appear when it is established that the accused was not advised by court or counsel of his rights regarding appeal and did not know them, being in the position of one not represented, whom the court is required by Rule 37 to advise. Where constitutional, jurisdictional or otherwise basic rights are involved the courts ought not to fashion stringent rules to prevent adjudication with respect to those rights. Our position is somewhat similar to that of the Court of Appeals for the Fifth Circuit recently announced in an opinion by Judge Wisdom in *Larson* v. *United States*, 275 F.2d 673. There, while agreeing that collateral attack is ordinarily not available when an appeal has not been taken from the judgment of conviction, the court adds the qualification that "the record indicates a conscious election not to appeal." 275 F.2d at 679.

208 APPENDIX

The opinion of December 30, 1959, referred to in the opinions of Judge Washington and Judge Fahy, together with Judge Miller's concurring statement, is as follows:

Before EDGERTON, WILBUR K. MILLER and FAHY, *Circuit Judges.*

FAHY, *Circuit Judge*: Appellant was convicted of robbery April 15, 1957. The principal evidence was a confession he had signed. Counsel represented him and no question is raised as to the adequacy of his assistance. Appellant took no appeal. Three months later he filed a motion under 28 U.S.C. § 2255 (1958) to vacate the sentence imposed as a result of his conviction. The motion contained allegations as to the manner in which the confession was obtained which, if true, would have rendered the confession inadmissible because the result of coercion. The motion was denied. Preparation of an

appeal from this denial disclosed that the notes of the court reporter covering the hearing on the section 2255 motion could not be found. Appellant accordingly moved in this court to remand for a new section 2255 hearing. We denied this motion but ordered preparation of the transcript of the proceedings of the trial itself as a supplemental record on the appeal. This transcript is now before us and shows that at the trial the question of the admissibility of the confession was first the subject of a hearing outside the presence of the jury. On the basis of evidence thus adduced as to the manner in which the confession was obtained the court ruled it admissible, subject to the jury's duty to reject it should they find that it was involuntary. The evidence respecting the obtaining of the confession was then adduced before the jury itself. Under instructions as to which no question is raised the jury convicted appellant, concluding, as we assume, that the confession was voluntary.

209 Appellant contends that the evidence as to the manner in which the confession was obtained shows as a matter of law that the confession was coerced and consequently that he is entitled to have his sentence set aside on this collateral attack under section 2255, notwithstanding no appeal was taken from the judgment of conviction. We assume *arguendo*, without ruling on the question, that the confession was involuntary as a matter of law.

The Supreme Court has held several times that in state court trials the use of a coerced confession violates the rights of the accused protected by the Fourteenth Amendment, and there can be no question that the use of such confession to convict in a federal trial offends the Fifth Amendment. In *Leyra* v. *Denno*, 347 U.S. 556, a state conviction obtained in such circumstances was set aside in federal habeas corpus proceedings initiated subsequently to final state action sustaining the conviction. Other convictions so obtained, reviewed and reversed by the Supreme Court on writ of certiorari to or on appeal from the highest state court, rather than in habeas corpus proceedings as in *Leyra*, also have been characterized as violative of the Fourteenth Amendment. *Spano* v. *New York*, 360 U.S. 315; *Payne* v. *Arkansas*, 356 U.S. 560;

Malinski v. *New York*, 324 U.S. 401; *Lisenba* v. *California*, 314 U.S. 219. A feature of each of these cases, however, including Leyra, is that the trial was in a state court and had been reviewed on appeal by the highest court of the state without correction of the erroneous admission of the confession.

Section 2255 is in terms applicable to a motion to vacate a sentence by a federal court upon the ground that it was "imposed in violation of the Constitution or laws of the United States," but the constitutional ground is phrased in the third paragraph of the section as "such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack." Moreover, no distinction is made in the language of the section between violation of the "Constitution" and
210 violation of "laws of the United States," thus seeming to expose a conviction on either ground to collateral attack in like procedural circumstances. And we have found no case in which collateral review by motion under section 2255 or by habeas corpus has been had of a conviction in a District Court of the United States on the basis of a coerced confession followed by no appeal to a United States Court of Appeals;[1] although the Supreme Court, in addition to cases above referred to, has said on other occasions that collateral attack is available to set aside a sentence resting upon any infringement of a constitutional right. In *Bowen* v. *Johnston*, 306 U.S. 19, where, however, the question was one of jurisdiction of the trial court, the Court said that if it were found that the court had no jurisdiction "or that in its proceedings . . . constitutional rights have been denied, the remedy of *habeas corpus* is available," 306 U.S. at 24. And the opinion in *Sunal* v. *Large*, 332 U.S. 174, 182, infers that habeas corpus is available where the error trenches "on any constitutional rights of defendants" or involves "the jurisdiction of the trial court," the Court there holding, however, that the alleged error, not deemed of a consti-

[1] Cf. *Thomas* v. *United States*, ... U.S. App. D.C. ...., ... F. 2d .... (No. 14941, Oct. 15, 1959), in which a coerced plea of guilty was held subject to collateral attack by motion in the nature of coram nobis.

tutional or jurisdictional character, was for review on direct appeal and not by habeas corpus. And see *Darr* v. *Burford*, 339 U.S. 200, 206.

It would seem clear that a failure to appeal from a conviction does not always save it from collateral attack on a constitutional ground, or indeed on other ground where the court is convinced justice requires a remedy, though sought collaterally.[2] In other words the
211 Great Writ, and section 2255, are not to be imprisoned with an ironclad rule stated in terms of collateral relief not being a substitute for an appeal.[3] In our treatment of the subject in *Smith* v. *United States*, 88 U.S. App. D.C. 80, 187 F.2d 192, *cert. denied*, 341 U.S. 927, however, we held that where the violation of constitutional right is in the admission of evidence the error ordinarily must be corrected by direct appeal:

> Such admission alone does not result in the denial of a constitutional guaranty so long as the error is subject to correction on appeal and there is no indication of any deterrent to appeal, such as lack of counsel. Accordingly, in such circumstances the method of correction must be direct, not collateral.

88 U.S. App. D.C. at 85, 187 F.2d at 197. And see *Adams* v. *United States*, 95 U.S. App. D.C. 354, 222 F.2d 45. Our problem now is whether this position should be abandoned.[4]

---

[2] See discussion of the problem in the separate dissenting opinions of Mr. Justice Frankfurter and Mr. Justice Rutledge in *Sunal*.

[3] "The rule requiring resort to appellate procedure when the trial court has determined its own jurisdiction of an offense is not a rule denying the power to issue a writ of *habeas corpus* when it appears that nevertheless the trial court was without jurisdiction. The rule is not one defining power but one which relates to the appropriate exercise of power. . . . [T]he rule is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Bowen* v. *Johnston*, 306 U.S. at 26-27.

[4] We noted in *Smith* that the uniform course of decisions in the Circuit Courts conformed with our disposition of that case.

In the coerced confession cases the Supreme Court has required the prisoner first to exhaust his state remedies, including all appellate remedies, before applying to a federal court for a writ of habeas corpus. *Darr* v. *Burford*, 339 U.S. 200. *Darr* was based on 28 U.S.C. § 2254 (1958) which for prisoners in custody pursuant to the
212 judgment of a state court is the counterpart of section 2255 for persons under federal sentence.[5] Principally on grounds of comity *Darr* construed section 2254 to necessitate a petition for certiorari to the Supreme Court where there has been a denial of relief by the highest court of the state, before the federal District Court could entertain a petition for writ of habeas corpus, absent exceptional circumstances.

Although section 2255 contains no provision for exhaustion of federal appellate remedies before a collateral attack upon a federal sentence may be sustained, the orderly administration of criminal law by the federal courts, of somewhat comparable rank with comity, is involved in such an attack when no appeal has been prosecuted from the judgment of conviction and no reason advanced for the omission to appeal. We remain of the view that the right of appeal may not be abandoned and resort had to section 2255 whenever the conviction rests on evidence admitted at the trial in violation of a constitutionally protected right. Otherwise the appellate process to cure error in the admission of evidence would be *pro tanto* atrophied. One under sentence by a federal court in such a case could simply ignore his right of appeal and resort to section 2255 at any time, and if he could do this for violation of the "Constitution" he could do the same for violation of the "laws of the United States," for these are bracketed on an equal footing in the context of section 2255. Yet that section is not an enlargement of the area of collateral attack theretofore

[5] Section 2254 expressly provides that a writ of habeas corpus will not issue "unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

available by habeas corpus; that is to say, the consti-
213 tutional ground referred to in section 2255 remains one arising only in such circumstances as to be assertible collaterally rather than directly,[8] as is the case when the ground asserted is a violation of the "laws of the United States."

We are therefore constrained in the present status of Supreme Court decisions to hold that in this case collateral attack is not available in the complete absence of any attempt to excuse the failure to appeal, and in the absence also of a showing that collateral remedy is required in order to avoid manifest injustice. We add these qualifications in deference to the flexibility to be accorded section 2255 consistently with the purpose and tradition of the Great Writ, of which section 2255 is a complement. See *Darr* v. *Burford*, 339 U.S. 200, 219 (dissenting opinion of Mr. Justice Frankfurter).

No reason is advanced by appellant for his failure to appeal from the judgment of conviction, and the facts of the case do not lead us to hold that, nevertheless, justice requires that appellant should be granted relief.

Affirmed

WILBUR K. MILLER, Circuit Judge, concurs in the result but not in the opinion.

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[8] Thus the third paragraph of section 2255, as we have indicated, states: "If the court finds that . . . there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack," the prisoner is entitled to relief.

214 IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1959

No. 14,683

Criminal 569-56

JOHN E. HODGES, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

(File endorsement omitted)

APPEAL FROM the United States District Court for the District of Columbia.

Before: Prettyman, Chief Judge, Edgerton, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, sitting en banc.

Judgment—July 21, 1960

THIS APPEAL came on to be reheard before the court en banc on the record on appeal from the United States District Court for the District of Columbia, and was reargued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this court that the judgment of the District Court denying appellant's motion to vacate sentence under 28 U.S.C., Section 2255, is affirmed.

Per Curiam.

Dated: July 21, 1960

Opinion by Circuit Judge Washington, with whom Prettyman, Chief Judge, and Wilbur K. Miller, Danaher, Bastian and Burger, Circuit Judges, join.

Separate opinion by Fahy, Circuit Judge, joined by Edgerton and Bazelon, Circuit Judges concurring in part, dissenting from the judgment.

215 IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960

No. 14,683

Criminal 569-56

JOHN E. HODGES, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

(File endorsement omitted)

Before: Edgerton, Bazelon and Fahy, Circuit Judges in Chambers.

Order Amending Opinion—February 23, 1961

It is ORDERED that the separate opinion of Circuit Judge Fahy, with whom Circuit Judges Edgerton and Bazelon joined, filed July 21, 1960, in the above-entitled case is amended by substituting the word "majority" for the words "per curiam" in the sixth line on page 6.

Dated: February 23, 1961

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216 Clerks Certificate to foregoing transcript omitted in printing

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217 IN SUPREME COURT OF THE UNITED STATES

No. 389 Misc., October Term, 1960

JOHN E. HODGES, *Petitioner*,

v.

UNITED STATES

Order Granting Motion for Leave to Proceed in Forma Pauperis and Granting Petition for Writ of Certiorari—February 20, 1961

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 748.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

February 20, 1961

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 58

JOHN E. HODGES,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 58

JOHN E. HODGES,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the district court (R. 6-8) is reported at 156 F. Supp. 313. The initial opinion of the court of appeals (R. 141-146) is reported at 282 F.2d 864 as an appendix to the opinion of the court of appeals on rehearing *en banc*. The opinion of the court of appeals on rehearing *en banc* (R. 148-161) is reported at 282 F.2d 858.

Jurisdiction

The initial judgment of the court of appeals was entered on December 30, 1959 (R. 147). A petition for rehearing, timely filed, was granted on April 15, 1960 (R. 146). The judgment of the court of appeals on rehearing *en banc* was entered on July 21, 1960 (R. 162). The petition for a writ of certiorari was filed on September 14, 1960, and was granted on February 20, 1961 (R. 164). 365 U.S. 810. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Petitioner seeks to attack his federal conviction collaterally under 28 U.S.C. §2255 on the ground that it was based on a coerced confession.

The question presented is whether his right to collateral attack on this ground is extinguished because he failed to appeal directly from his conviction for the reason that he neither knew nor was advised by counsel of his appellate rights.

Statute Involved

28 U.S.C. §2255 provides as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move

the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such a court has denied him relief,

unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Statement

On July 15, 1957, petitioner John E. Hodges was convicted of robbery[1] on the basis of a confession admitted in evidence over his objection that it had been coerced (R. 82). Both opinions of the court of appeals (that of the panel (R. 141-146) and of the court on rehearing *en banc* (R. 148-161)) assumed *arguendo* that the confession was, in fact, coerced. Following the court of appeals, we, too, shall assume that the confession was coerced since the question of coercion *vel non* is not before the Court in the present posture of the case. A summary of the facts surrounding the prisoner's confession is, however, given in a footnote.[2]

---

[1] The robbery which petitioner is alleged to have committed occurred on July 30, 1955, in Washington, D. C., when a cashier at Briggs and Company was held up and $4,950 taken from him (R. 23-24).

[2] At the time John Hodges was arrested, he was living with his wife and child in Chicago (R. 51). At the request of the Washington police, the Chicago police on Sunday evening, April 29, 1956, went to John Hodges' home and arrested him without a warrant (R. 25-26). Not until the afternoon of May 2, 1956, three days later, was Hodges turned over to two Washington policemen who had flown in from Washington (R. 38-40). During his three-day incarceration by the Chicago police, Hodges was put through a series of interrogations, awakened in the middle of the night, forced to sleep on a cell-block floor, and, on three different occasions, physically beaten (R. 27, 56-61, 72, 116-122, 129). Without the benefit of counsel, he was held incommunicado during this entire period and was denied permission even to call his wife (R. 61, 123). His wife's persistent and repeated efforts to communicate with her husband by calling the police also proved unavailing (R. 52-53). Despite this treatment, Hodges persistently and consistently denied any participation in the robbery throughout this entire period (R. 56-61, 71-72, 116-121, 122, 128-129).

When he was turned over to the Washington police, the Washington police took Hodges into a small room off of the Chicago

This coerced confession was the only evidence introduced at the trial connecting the petitioner with the alleged offense. On this basis, he was convicted by a jury and sentenced by the court to a term of imprisonment of from four to thirteen years (R. 1).

---

police headquarters and again charged him with the robbery (R. 72, 100). Again he denied the charge (R. 72, 100). The Washington police then showed him a confession by Thomas Straymer and told him that his brother, Frank Hodges, had also confessed and that both confessions implicated him (R. 72-73). Again they asked him to sign a confession (R. 73). Again he replied that he had nothing to do with the robbery and was not going to sign a confession (R. 73, 100).

Then the police played their trump card: "If that is the case, we will just have to turn you back to the Chicago police" (R. 73). Under this threat, John Hodges broke and signed the confession (J. A. 73, 75). Although they took the stand, the record contains no specific denial of this threat by the Washington police.

It is interesting to note that a United States Commissioner's warrant had been issued for Hodges' arrest prior to the time the Washington police left for Chicago (R. 47, 105-106). The Washington police did not request the United States Marshal to transmit this warrant to Chicago because, according to the testimony of one of the policemen, that would have prevented the police from interrogating Hodges (R. 48, 50, 105-106). In the officer's own words, "We wanted to talk to Hodges, and we knew that if the Commissioner's warrants were served, we would not be able to talk to them [petitioner and his brother] until they got back here in Washington" (R. 48). And their avowed purpose was not simply to bring Hodges back to Washington. On the contrary, their only purpose in going to Chicago, as another officer testified, was, "to talk to John in order to get a confession from him" (R. 106).

The following morning, May 3, petitioner was flown back to Washington; but it was not until Friday, May 4, five days after his arrest, that he was finally arraigned (R. 45-46, 49, 65-66). (This delay in arraignment is, of course, a plain violation of the rule established in *Mallory* v. *United States*, 354 U.S. 449 (1957), which invalidated a conviction based on a confession obtained during a delay prior to arraignment of only a few hours. Unfortunately, this decision was not handed down until almost two months after the conviction and sentencing of the defendant in this case. Because of the fact that the erroneous admission of a *Mallory* confession is not a constitutional violation, we have not

No appeal was taken from this conviction, for reasons which will subsequently be discussed, *infra*, pp. 7-8.

Less than three and a half months after sentence was imposed, petitioner filed a motion under 28 U.S.C. §2255 to vacate his sentence on the ground that his conviction had been based on a coerced confession in violation of his constitutional rights (R. 1-3). After a hearing, the district court denied the motion (R. 6-8).

On appeal, a panel of the court of appeals affirmed (R. 141-146). Assuming that petitioner's confession was involuntary (R. 142), the court ruled that a conviction based upon a coerced confession was not subject to collateral attack under Section 2255 " . . . when no appeal has been prosecuted from the judgment of conviction and no reason advanced for the omission to appeal . . . " (R. 145). Accordingly, the court felt " . . . constrained in the present status of Supreme Court decisions to hold that in this case collateral attack is not available in the complete absence of any attempt to excuse the failure to appeal . . . " (R. 146).

Petitioner sought rehearing on the narrow ground that the court had failed to consider his proffered[3] explanation

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pressed this error at this stage in the habeas corpus proceeding in view of the fact that the confession was also coerced.)

[3] A word should be said regarding the record on appeal. When present counsel were appointed by the court of appeals to represent petitioner, it was discovered that the reporter's notes of the Section 2255 hearing had been lost (R. 125). The court of appeals, being "of the view that the issues on this appeal can be adequately determined by reference to the transcript of the trial proceedings," ordered that transcript prepared and filed as a supplemental record on appeal (R. 12).

Although the trial transcript did contain evidence regarding the circumstances in which the confession was obtained, it did not, of course, reveal the circumstances surrounding the failure to appeal directly from the conviction. Therefore, petitioner moved the

for failing to take a direct appeal from the conviction (R. 146). The court ordered a rehearing *en banc* to consider petitioner's reasons for failing to appeal and its possible effect on the court's ruling (R. 146-147).

The circumstances surrounding petitioner's failure to appeal, in brief, are these: Petitioner is a layman with a high school education and no knowledge of the law (R. 15). Prior to this time, he had never had a brush with the law more serious than a traffic violation, and was completely unaware of his appellate rights or the necessity of filing a notice of appeal within ten days after his conviction (R. 15).

Petitioner's trial counsel, in sworn statements, admit that they never discussed with petitioner the possibility of taking an appeal, nor the procedure for taking an appeal, despite their "strongly felt" belief that an appeal should be taken[4] (R. 15-16). After petitioner's sentencing, his counsel had no opportunity to speak with or advise the prisoner because he was immediately removed from the courtroom by the marshal (R. 16). Moreover, at this point, counsel apparently considered their representation ter-

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court of appeals further to supplement the record on appeal with affidavits executed by himself and by his trial counsel setting forth the facts surrounding the failure to appeal and the reasons therefor (R. 12-16). A different panel of the court of appeals denied this motion without opinion (R. 22), and, therefore, the panel which heard the case on the merits was apparently unaware of the reasons for petitioner's failure to take a direct appeal.

[4] The majority opinion on the rehearing *en banc* noted that, "If either [of Hodges' trial counsel] had perceived any substantial basis for an appeal, it is almost incredible that Hodges would not have been so advised prior to May 13, the last day for taking an appeal" (R. 151).

The court obviously overlooked the uncontradicted affidavit of petitioner's trial counsel that they "strongly felt" that an appeal should be taken (R. 16).

minated (R. 15-16). It may not be entirely without significance that counsel, although of the defendant's own choosing and not appointed by the court, knew that they would receive no compensation for their services because both the prisoner and his wife were without funds (R. 15-16), and counsel had just completed a five-day trial conducting petitioner's defense (R. 15).

In these circumstances, the ten days elapsed without the filing of a notice of appeal. However, three and one-half months later, petitioner obtained counsel to bring the present motion under Section 2255 (R. 1).

Despite these reasons for failing to appeal, the court of appeals on rehearing again affirmed, three judges dissenting (R. 148-161). The majority ruled that an unappealed conviction based on a coerced confession could not be set aside on a 2255 motion regardless of the reasons for failing to appeal, whether "excusable or not" (R. 151). Nothing short of Government obstruction of appellate review would permit collateral attack of an unappealed conviction based on a coerced confession (R. 151).

Judge Fahy, writing for the minority, thought otherwise:

> When in our opinion of December 30, 1959, we adhered to a limitation, not contained in section 2255 itself, but deemed to inhere in the orderly administration of justice; namely, that even in case of such fundamental error collateral attack is unavailable when no appeal was taken and no reason appears for failure to appeal, we went as far I think as the courts can possibly go in restricting the availability of review under section 2255. If the accused did not know and was not advised of his appeal rights, the adjudicatory doors opened by Congress in enacting section 2255,

> like the avenues available under the Great Writ, should not be closed and persons left in prison as a result of violation of their constitutional rights . . . I cannot agree the courts must say to the person imprisoned under a basically invalid sentence that the law affords no remedy because, although he did not know and was not advised of his appeal rights, he should have appealed anyhow (R. 155).

After certiorari was granted, the Chief Justice admitted the petitioner to bail on his showing that he had been a model prisoner during his four-year incarceration and that he was still remembered by his friends and acquaintances as a kind and charitable man, of high moral character and integrity.[5]

Summary of Argument

I

This Court's decisions establish that collateral attack based on a constitutional error is available, even though no direct appeal from the conviction was taken.

In *Sunal* v. *Large*, 332 U.S. 174 (1947), this Court in a 6-3 decision refused to permit a collateral attack grounded on a non-constitutional error because petitioners failed to appeal directly from their federal convictions; but in dicta the Court indicated that if the claimed error had been of

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[5] Petitioner is now employed by Altimont Brothers, Inc., general contractors. Originally he was employed by this concern as a draftsman, a trade he learned while in prison. He is now being trained in estimating the costs of various items in contracts on which his employer is called upon to bid; and, since he was hired in March 1961, he has received two unsolicited $10-a-week raises. Petitioner voluntarily contributes $20 a week to the support of his two children, who are living with his former wife, now remarried, and sees his children weekly.

constitutional proportions, collateral attack would have been permitted. The dictum in the *Sunal* case was converted to holding in *Jordan* v. *United States*, 352 U.S. 904 (1956), where, in a per curiam reversal, the Court ordered consideration of a claim of constitutional deprivation despite a failure to raise the point upon direct appeal from the federal conviction. This ruling was made in the face of the Government's contention in its Brief in Opposition that the error could have and should have been corrected on appeal and for that reason collateral attack should be denied.

In *United States* v. *Robinson*, 361 U.S. 220 (1960), the Court ruled that the filing of a notice of appeal within ten days is jurisdictional and may not be enlarged, even on a finding of excusable neglect. The Court based this ruling in part on the "collateral remedies available to redress denial of basic rights" at any time (361 U.S. at 230, n. 14), again indicating its view that failure to appeal from a federal conviction does not bar collateral attack based on a basic—constitutional—error.

Finally, this Court has on occasion permitted collateral attack of an unappealed federal conviction to correct a mere error of law. *Bowen* v. *Johnston*, 306 U.S. 19 (1939). In *Bowen*, an error of law was considered because it was a recurring and uncertain question. It did not, however, relate to the prisoner's guilt or innocence. How much more compelling is the instant case where the prisoner's claim is a serious constitutional error which relates directly to his guilt or innocence.

II

Unless this collateral remedy is provided, prisoners who have been convicted and imprisoned on the basis of confessions extorted from them against their will, as we must assume, will continue to serve their illegal sentences without redress.

Moreover, a decision in petitioner's favor will not atrophy the appellate process. A prisoner is not likely purposely to reject the appellate route in favor of habeas corpus, nor is he likely to withhold evidence of a constitutional violation so that he may bring it to the court's attention on habeas corpus. The scope of review on habeas corpus is narrow and time is not on the prisoner's side.

Contrary to the suggestion of the majority below, there will be no unusual difficulty in discriminating between meritorious and spurious claims that a confession had been coerced. The burden of proof is on the prisoner. In determining the merits, a court will consider any disadvantage to the Government resulting from a delay in bringing a 2255 motion. The Government also has that most powerful weapon against spurious claims, cross-examination.

Courts have experienced no unusual difficulty in determining whether a claim of coerced plea of guilty is meritorious or not. The problem of discriminating between truth and falsehood in such a case is precisely the same as in a claim of a coerced confession. So far as we are aware, prisoners are not finding an easy exit from their cells on the basis of perjured testimony that their pleas of guilty had been coerced. Nor have the courts been flooded with such motions. In these circumstances, there is no more reason to suspect that a decision, in petitioner's favor here will present the courts with any unusual difficulty.

III

If for no other reason, petitioner's claim in this case must be heard because, as a practical matter, an appeal was simply unavailable to him. This being his first brush with the law, he knew nothing of his appellate rights or of the requirement that a notice of appeal must be filed within ten days. His trial counsel who were serving without compensation, never even mentioned an appeal to him, despite

their "strongly felt" belief that an appeal should be taken. And during the crucial ten-day period for which the Government seeks to hold petitioner accountable, he was without counsel.

How then, can a court refuse to hear the petitioner's claim on the ground that he failed to appeal?

ARGUMENT

Introduction

It may be flatly and categorically stated that a criminal conviction is subject to collateral attack if the conviction was based on a coerced confession. This Court, as well as lower federal courts, have so frequently entertained collateral attack of such a conviction that it can no longer be questioned that this is an appropriate basis for such an attack.* It is accordingly unnecessary to recount and stress

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* See, e.g., *Reck* v. *Pate*, 367 U.S. 433 (1961); *Rogers* v. *Richmond*, 365 U.S. 534 (1961); *Thomas* v. *Arizona*, 356 U.S. 390 (1958); *Leyra* v. *Denno*, 347 U.S. 556 (1954); *Stickney* v. *Ellis*, 286 F.2d 755 (5th Cir. 1961), certiorari denied, 365 U.S. 888 (1961) (collateral attack entertained and considered, but denied on the merits); *United States ex rel. Alvarez* v. *Murphy*, 277 F.2d 304 (2d Cir. 1960) (collateral attack entertained and considered, but denied on the merits), certiorari denied, 365 U.S. 871 (1961); *United States* v. *Sain*, 276 F.2d 324 (7th Cir. 1960) certiorari granted sub nom. *Townsend* v. *Sain*, 365 U.S. 866 (1961) (collateral attack entertained and considered, but denied on the merits); *United States ex rel. Corbo* v. *La Vallee*, 270 F.2d 513 (2d Cir. 1959), certiorari denied, 361 U.S. 950 (1960); *United States ex rel. Eckwerth* v. *Denno*, 261 F.2d 511 (2d Cir. 1958), certiorari denied, 358 U.S. 945 (1959) (collateral attack entertained and considered, but denied on the merits); *United States* v. *Jackson*, 256 F.2d 7 (2d Cir. 1958), certiorari denied, 357 U.S. 908 (1958); *United States ex rel. Caminito* v. *Murphy*, 222 F.2d 698 (2d Cir. 1955), certiorari denied, 350 U.S. 896 (1955); *United States ex rel. Kiernan* v. *La Vallee*, 191 F. Supp. 455 (D.C.N.D. N.Y. 1961); *United States ex rel. Martin* v. *Murphy*, 187 F. Supp. 395 (D.C.N.D. N.Y. 1960) (collateral attack enter-

here how abhorrent it is to any civilized jurisprudence to permit a conviction based on a coerced confession.[7]

The sole question which the petitioner therefore raises here—a question raised for the first time in this Court—is whether this right collaterally to attack his federal conviction based on a coerced confession is extinguished by his failure to appeal directly from his conviction. It is petitioner's contention that this right is not and should not be curtailed because of the prisoner's failure to appeal directly from his federal conviction.

I.

This Court's Decisions Establish That a Conviction Obtained in Violation of a Constitutional Right Is Subject to Collateral Attack Regardless of the Prisoner's Failure to Appeal.

1. *Sunal* v. *Large*, 332 U.S. 174 (1947), is this Court's most recent discussion of the effect of a failure to appeal on the right of collateral attack. In that case, the petitioners had been convicted for refusal to submit to induction into the armed services and had failed to appeal from their convictions. Subsequently, they sought habeas corpus urg-

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tained and considered, but denied on the merits); *United States ex rel. Wolfe* v. *La Vallee*, 179 F. Supp. 939 (D.C.N.D. N.Y. 1960), certiorari denied sub nom. *Wolfe* v. *New York*, 360 U.S. 913 (1959) (collateral attack entertained and considered, but denied on the merits); *cf. Overman* v. *United States*, 281 F.2d 497 (6th Cir. 1960).

[7] Excellent discussions by this Court of the fundamental invalidity which inheres in such convictions may be found in *Brown* v. *Mississippi*, 297 U.S. 278 (1936) and *Blackburn* v. *Alabama*, 361 U.S. 199, 205 (1960); see also *Culombe* v. *Connecticut*, 367 U.S. 568 (1961); *Rogers* v. *Richmond*, 365 U.S. 534 (1961); *Spano* v. *New York*, 360 U.S. 315 (1959), and cases cited therein; *Payne* v. *Arkansas*, 356 U.S. 560 (1958); *Fikes* v. *Alabama*, 352 U.S. 191 (1957); *Leyra* v. *Denno*, 347 U.S. 556 (1954); *Watts* v. *Indiana*, 338 U.S. 49 (1949); *Lisenba* v. *California*, 314 U.S. 219 (1941).

ing that their convictions were invalid because the trial court had erroneously held (1) that their draft classifications were final and not open to attack in the criminal trial and (2) that, therefore, evidence to show that they should have been classified as ministers of religion, rather than 1-A, was inadmissible. It was clear at the time of their habeas corpus petitions that the trial courts had erred in these rulings at their criminal trials. This Court in a 6-3 ruling nevertheless refused to permit a collateral attack.

In deciding that collateral attack was unavailable in the absence of a direct appeal from the conviction, the majority in that case stressed two points. The first was that the district courts' error was not of constitutional proportions; the district courts erred in refusing to admit the proffered evidence regarding the allegedly erroneous draft classification, but this did not infringe a constitutional right. This Court therefore concluded that:

> Wise judicial administration of the federal courts counsels against [collateral attack of a federal conviction], at least where the error does not trench on any constitutional rights of defendants . . . [332 U.S. at 182].

In its careful review of prior cases, the majority recognized that:

> The writ [of habeas corpus] has at times been entertained either without consideration of the adequacy of relief by the appellate route or where an appeal would have afforded an adequate remedy. Illustrative are those instances where the conviction was under a federal statute alleged to be unconstitutional,[8] where

[8] *Ex parte Siebold*, 100 U.S. 371; *Ex parte Curtis*, 106 U.S. 371; *Ex parte Yarbrough*, 110 U.S. 651; *In re Coy*, 127 U.S. 731; *Matter of Heff*, 197 U.S. 488; *Matter of Gregory*, 219 U.S. 210; *Baender* v. *Barnett*, 255 U.S. 224. [Footnote in original]

> there was a conviction by a federal court whose jurisdiction over the person or the offense was challenged,[9] *where the trial or sentence by a federal court violated specific constitutional guaranties*[10] [332 U.S. at 178]. [Emphasis supplied.]

The Court contrasted cases involving constitutional deprivations with cases involving a mere error of law, as was involved in *Sunal*:

> It is plain, however, that the writ is not designed for collateral review of errors of law committed by the trial court [332 U.S. at 179].

The second point which the majority stressed in *Sunal* was that the decision not to appeal from the criminal conviction was a conscious and deliberate one. The Court stated:

> Defendants had counsel. Nor was there any other barrier to the perfection of their appeals . . . [332

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[9] *Ex parte Lange*, 18 Wall. 163 (double jeopardy); *In re Snow*, 120 U.S. 274 (same); *In re Nielsen*, 131 U.S. 176 (same); *Counselman* v. *Hitchcock*, 142 U.S. 547 (self-incrimination); *Ex parte Wilson*, 114 U.S. 417 (requirement of indictment); *Ex parte Bain*, 121 U.S. 1 (same); *Callan* v. *Wilson*, 127 U.S. 540 (jury trial); *Johnson* v. *Zerbst*, *supra*, (right to counsel); *Walker* v. *Johnston*, 312 U.S. 275 (same); *Waley* v. *Johnston*, [316 U.S. 101] (coerced plea of guilty). [Footnote in original]

[10] *Tinsley* v. *Treat*, 205 U.S. 20 (removal case). In removal cases *habeas corpus* is available not to weigh the evidence to support the accusation but to determine whether there is an entire lack of evidence to support it. *Hyde* v. *Shine*, 199 U.S. 62, 84. It is also available to determine whether removal to the district in question violates a constitutional right of the accused, *Haas* v. *Henkel*, 216 U.S. 462, or whether the court before which it is proposed to take and try the accused has jurisdiction over the offense. *Salinger* v. *Loisel*, 265 U.S. 224. But *habeas corpus* will not be entertained to pass on the question of jurisdiction where it involves consideration of many facts and seriously controverted questions of law. *Rodman* v. *Pothier*, 264 U.S. 399; *Henry* v. *Henkel*, 235 U.S. 219. [Footnote in original]

> U.S. at 177] . . . [S]ince *they chose* not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile [332 U.S. at 181]. [Emphasis supplied.]

The unmistakable implication from the *Sunal* decision is that if the collateral attack had been based on a constitutional error—as it is in the instant case—or if there had been reasonable excuse for failing to appeal—as there is in the instant case—the result would have been different.

2. The implication of the *Sunal* case is fully borne out by *Jordan* v. *United States*, 352 U.S. 904 (1956). In that case the prisoner had been convicted of attempt to commit robbery. Although an appeal was taken from this conviction, the defendant did not then argue, as he could have, that he had been deprived of a speedy trial in violation of his constitutional rights. His conviction was affirmed and he did not seek certiorari.[11] Later he filed a motion under Section 2255 to vacate his sentence on the g[illegible]d, *inter alia*, that he had been denied the speedy trial [illegible] the Constitution guarantees. The Court of Ap[illegible] ruled that this contention could not be raised on a 2[illegible] motion since it could have been, but was not, raised by appeal. The prisoner petitioned for certiorari solely on the ground that his conviction was constitutionally invalid because he had been denied a speedy trial.

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[11] The petitioner thus not only failed to exhaust his direct appellate remedies by not raising the constitutional question on his appeal, but he also failed to exhaust his direct appellate remedies by not seeking review in this Court. *Cf. Darr* v. *Burford*, 339 U.S. 200 (1950).

In its opposition to the petition for certiorari, the Government argued:

> Delay in bringing a case to trial is the type of defense which a defendant who has counsel can raise at the trial and as to which an error can and should be corrected on appeal. For that reason, it is not normally the type of error which can be made a basis for collateral attack. [Brief in Opposition, page 7, No. 119 Misc., 1956 Term.]

This, of course, is the same contention which the Government makes here. In *Jordan* the Court granted the writ and reversed *per curiam* on the petition, thus clearly rejecting the Government's contention. The Court of Appeals for the District of Columbia Circuit has interpreted this Court's *per curiam* order in *Jordan* as follows:

> By reversing and remanding to the District Court for a hearing on the merits the Supreme Court appears to have ruled that failure to raise at trial or on direct appeal a point cognizable under section 2255 is no bar to its consideration in a section 2255 proceeding. [*Askins* v. *United States*, 251 F. 2d 909, 911, n. 3 (D.C. Cir. 1958.]

The *Jordan* case is clearly *a fortiori* to the case at bar and should, we submit, be controlling. No meaningful distinction can be drawn between the case in which an appeal has been taken, but fails to raise the constitutional point, and the case in which no appeal is taken at all. In both cases a constitutional error could have been, but was not, corrected on direct appeal. The policy considerations in determining whether such a constitutional claim may be raised on habeas corpus are identical in both cases.

There are, in addition, several reasons why the instant case is even more compelling than *Jordan*. In the first

place, the prisoner in *Jordan* offered no reason for failing to raise the constitutional validity of his conviction on his appeal; in the instant case, as a practical matter and viewed from the prisoner's individual viewpoint, petitioner had no opportunity to appeal. See, *infra*, pp. 32-33. Secondly, the constitutional defect urged in *Jordan* was unrelated to the prisoner's guilt or innocence; here the prisoner urges that he was convicted on the basis of a coerced confession —a charge which relates directly to his guilt or innocence.

It is therefore clear that unless this Court is to retreat from its holding in *Jordan*, the judgment in this case must be reversed. The Government apparently recognizes this, for despite our heavy reliance on *Jordan* in the petition for certiorari, the Government did not give this case even passing mention in its opposition. In the Court of Appeals too, the Government treated the *Jordan* case by ignoring it.[12]

3. The most recent case in this Court which indicates that constitutional defects in a conviction may be raised on collateral attack regardless of a failure to appeal is *United States* v. *Robinson*, 361 U.S. 220 (1960). The question in *Robinson* was whether the ten-day appeal period in criminal cases may be enlarged on a finding of excusable neglect. The Court held that the ten-day appeal period is jurisdictional and may not be enlarged even on a finding of excusable neglect. It reached this decision in part, however, on a consideration of the complementary flexibility of collateral remedies. Thus, the severity of the jurisdictional bar is not unduly harsh because alleviated by the availability of other collateral remedies. Were this not so, the

[12] The Court of Appeals opinion does not deal with the *Jordan* case either.

result in *Robinson* might have been different. The Court stated:

> The allowance of an appeal months or years after expiration of the prescribed time seems unnecessary for the accomplishment of substantial justice, for there are a number of collateral remedies available to redress denial of basic rights. Examples are: The power of a District Court under Rule 35 to correct an illegal sentence at any time, and to reduce a sentence within 60 days after the judgment of conviction becomes final; *the power of a District Court to entertain a collateral attack upon a judgment of conviction and to vacate, set aside or correct the sentence under 28 U.S.C. §2255;* and proceedings by way of writ of error coram nobis [361 U.S. at 230, n. 14]. [Emphasis supplied.]

To deny a collateral remedy where the error is as basic as it is in this case simply because the prisoner failed to appeal would be to deny the promise held out by *Robinson*. This is especially true in view of the circumstances of the prisoner's failure to appeal here. See, *infra*, pp. 32-33.

The court below, in a strange turn of logic, has relied on *Robinson* to support its decision, arguing that to permit collateral attack here would "undermine" *Robinson* (R. 152). The difference between permitting collateral attack based on a constitutional deprivation and permitting a late appeal which could raise any kind of error is vast. We can do no better in refuting the argument of the majority below based on *Robinson* than by quoting Judge Fahy's careful discussion of this question in his dissent:

> We are not here concerned with an attempt to appeal out of time because of excusable neglect. We are here concerned with a collateral challenge to a sentence. The time limitation for appeal is rigid and

> jurisdictional, but the scope of review is as broad as the record itself. In contrast there is no time limitation applicable to a section 2255 motion, but the scope of review is narrow. The motion may be filed "at any time"—though I suppose it would not be entertained, as such, but would be treated as an appeal, if filed during the appeal period of ten days. Its limitation is other than that of time; it brings under review only errors of a constitutional, jurisdictional or otherwise fundamental character, such as the admission in evidence of a coerced confession, held by the Supreme Court time and again to violate constitutional rights [R. 154-155].

Thus, a holding in petitioner's favor here would fully comport with the implication of *Robinson;* a decision against him would remove in part the basis on which the majority relied in ruling as it did in *Robinson.*

4. Finally, we would like to stress a significant decision of this Court in which a disputed question of law that could have been settled by appeal was nevertheless entertained and disposed of on a petition for habeas corpus. *Bowen* v. *Johnston,* 306 U.S. 19 (1939). In that case, the prisoner had been convicted of murder in a United States District Court. The murder was alleged to have been committed on land within the exclusive jurisdiction of the United States. Having failed to appeal, the prisoner sought habeas corpus on the ground that the United States had no jurisdiction of the land on which the homicide had occurred. The Government argued that this question could not be raised on collateral attack, but only by writ of error. This Court unanimously rejected the contention despite the Court's acknowledgment that the question of the trial court's jurisdiction "may be the appropriate subject of ap-

pellate review" (306 U.S. at 24). In considering this question of law on habeas corpus, the Court stated:

> It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired . . . The rule requiring resort to appellate procedure when the trial court has determined its own jurisdiction of an offense is not a rule denying the power to issue a writ of habeas corpus when it appears that nevertheless the trial court was without jurisdiction. *The rule is not one defining power but one which relates to the appropriate exercise of power* [306 U.S. at 26-27]. [Emphasis supplied.]

The reason which the Court gave in *Bowen* for considering a question of law on habeas corpus—that the point is uncertain and confused—is not nearly so compelling as the reasons which petitioner adduces here. Moreover, the question which the petitioner raised in the *Bowen* case was in no way related to the fundamental fairness of the trial; it was a cold question of legal jurisdiction; here petitioner makes a grave constitutional charge which relates directly to the basic fairness of the trial proceeding.

The Court of Appeals for the District of Columbia Circuit has also entertained a collateral attack seeking to set aside a conviction for an error of law which could have been, but was not, corrected on appeal. *Askins* v. *United States,* 251 F.2d 909 (D.C. Cir. 1958). Although an appeal was taken in that case, the defendant failed to raise the question whether his sentence was barred by the statute of limitations in 18 U.S.C. §3282 (1952 ed.).[13] The effect

[13] 18 U.S.C. §3282 (1952 ed.) provided as follows: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indict-

of appellant's failure to raise this point on his appeal was squarely raised by the Government. The Court answered:

> 28 U.S.C. §2255 is plainly designed to permit a question which goes to the validity of the sentence to be raised for decision at any time. When a subject is within the limited class reviewable under section 2255 [as are convictions based on coerced confessions, see *supra*, p. 12], the fact that it is presented for the first time by motion under that section, though it could have been presented at the trial, at the sentencing, or on appeal from the judgment of conviction, is immaterial. *Jordan* v. *United States District Court*, 233 F. 2d 362, reversed on other grounds, 352 U.S. 904[3] [251 F.2d at 911].

Footnote 3:

> Not only does our *Jordan* decision support this proposition but in another portion of the opinion in that case we refrained from reaching under section 2255 the issue of lack of a speedy trial, in the absence of an "extreme case." We said the point was not raised at trial or on the direct appeal. The sole ground presented to the Supreme Court on the petition for certiorari was the denial of a hearing on the issue of a speedy trial. By reversing and remanding to the District Court for a hearing on the merits the Supreme Court appears to have ruled that failure to raise at trial or on direct appeal a point cognizable under section 2255 is no bar to its consideration in a section 2255 proceeding [251 F.2d at 911].

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ment is found or the information is instituted within three years next after such offense shall have been committed." This section has now been amended to increase the statute of limitations to five years. 18 U.S.C. §3282 (1958 ed.).

Thus precedent fully supports petitioner's position here —where a claim is cognizable under section 2255 the failure of a federal prisoner to raise it on direct appeal is no bar to his later raising it on collateral attack.[14]

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[14] Court of Appeals cases involving the availability of collateral attack to set aside convictions based on illegal confessions include *Eury* v. *Huff*, 146 F.2d 17 (D.C. Cir. 1944); *Miller* v. *Hiatt*, 141 F.2d 690 (3d Cir. 1944); *Burall* v. *Johnson*, 134 F.2d 614 (9th Cir. 1943); *Cash* v. *Huff*, 142 F.2d 60 (4th Cir. 1944). These cases were construed in *Smith* v. *United States*, 187 F.2d 192, 197 (D.C. Cir. 1950), certiorari denied, 341 U.S. 927 (1951), as involving "confessions obtained by illegal detention," rather than by coercion. The admission of a confession obtained during illegal detention is not, of course, a constitutional error as is the admission of a coerced confession.

Prior to the decision in *Mallory* v. *United States*, 354 U.S. 449 (1957), at which time all of the preceding cases were decided, there was considerable confusion regarding the distinction between these two types of confessions. See Hogan & Snee, "The McNabb-Mallory Rule," 47 Georgetown L.J. 1 (1958). Some of this confusion is reflected in these cases. However, on close examination it will be seen that the courts in each case were dealing with confessions obtained during illegal detention, rather than coerced confessions, with the exception of *Burall* v. *Johnson*, *supra*. In *Eury*, *Miller*, and *Cash*, the courts specifically treated the cases as *McNabb* problems and found that a *McNabb* confession could not be attacked on habeas corpus.

Burall v. *Johnson*, *supra*, is also easily distinguished. The court there denied the petition because the basis of the attack was not on a jurisdictional ground. Since the decision in the *Burall* case, there has been considerable expansion of the grounds on which collateral attack is available. It is no longer necessary to couch the claim in jurisdictional terms; it is sufficient if a constitutional deprivation is alleged. See "Note on the Sequel to the Johnson Case," Hart & Wechsler, *The Federal Courts and the Federal System*, (1953), p. 1258; Note, "The Freedom Writ—The Expanding Use of Federal Habeas Corpus," 61 Harv. L. Rev. 657, 660ff. (1948).

It is also worthy of mention that all of the Court of Appeals cases cited in this footnote were decided over fifteen years ago. During that time, there has been an unusual development and expansion of the law of federal habeas corpus. Accordingly, these cases are at this time of little significance.

II.

Policy Considerations, as Well as Precedent, Require a Reversal in This Case.

The competing policy considerations which must be balanced in determining the outcome of this case are simply stated:

On the one hand is the fact that, unless this collateral remedy is permitted, innocent men convicted and imprisoned, as we must assume, on the basis of confessions extorted from them against their will, will continue to serve their unjust and illegal sentences without redress. As early as 1936 in *Brown* v. *Mississippi*, 297 U.S. 278, a unanimous Court ruled that a conviction based on a coerced confession made of the trial a "mere pretense." "The rack and torture chamber may not be substituted for the witness stand" (297 U.S. at 285-6).

More recently another unanimous Court ruled that:

> . . . [T]he Fourteenth Amendment is grievously breached when an involuntary confession is . . . introduced into evidence in a criminal prosecution which culminates in a conviction. [*Blackburn* v. *Alabama*, 361 U.S. 199, 205 (1960)]

See also *Culombe* v. *Connecticut*, 367 U.S. 568 (1961); *Rogers* v. *Richmond*, 365 U.S. 534 (1961); *Payne* v. *Arkansas*, 356 U.S. 560 (1958); *Fikes* v. *Alabama*, 352 U.S. 191 (1957); *Leyra* v. *Denno*, 347 U.S. 556 (1954); *Watts* v. *Indiana*, 338 U.S. 49 (1949); *Lisenba* v. *California*, 314 U.S. 219 (1941); *Spano* v. *New York*, 360 U.S. 315 (1959), and cases cited therein.

It is in the light of this grave charge of constitutional deprivation that we must consider whether petitioner should be permitted to attack his conviction collaterally

despite his failure to appeal. This then is what the prisoner has to place in the balancing scales.

Against this consideration, we must balance what one eminent scholar has called the "time-worn shibboleth"[15] that "habeas corpus cannot be made to do service for an appeal." *Sunal* v. *Large*, 332 U.S. 174, 184 (1947) (dissenting opinion). We propose to examine precisely what considerations are summarized by this formula, reminding ourselves, as Mr. Justice Holmes long ago observed, "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." *Hyde* v. *United States*, 225 U.S. 347, 391 (1912) (dissenting opinion).[16]

It is said that the orderly administration of justice requires the correction of trial errors by appeal where that avenue is available. If by this is meant that habeas corpus will not lie where an appeal is presently available to correct the error, the answer is that in this case an appeal was *not* available at the time collateral relief was sought. The time for appeal had expired three months earlier.

If by this formula is meant that habeas corpus will not lie because at one time—now past—an appeal was available to correct the error, then we must ask why. If the only answer is that abstract considerations of legal symmetry or neatness require it, then it is obvious that the argument must be rejected. Such considerations cannot outweigh the need to provide a remedy for prisoners who have been convicted in violation of their constitutional rights.

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[15] Hart, "Forward: The Time Chart of the Justices, the Supreme Court, 1958 Term," 73 Harv. L. Rev. 84, 118 (1959).

[16] *Cf.* Mr. Justice Brandeis in his unpublished dissent in *Stratton* v. *St. Louis Southwestern Ry.*, "Our effort to reach sound conclusions will be futile if we substitute formulas for reasoning. Formulas block the paths to truth and wisdom." Bickel (ed.), The Unpublished Opinions of Mr. Justice Brandeis 151-2.

Does the argument have more substance than this? We submit that it does not because no prisoner is likely to reject the appellate route in favor of habeas corpus, given the choice.[17] No defendant will pass up the opportunity to appeal and purposely proceed to the penitentiary in order to enjoy the opportunity of bringing habeas corpus to test his contention that his confession was coerced. It is just as unlikely that a defendant will purposely fail to adduce evidence of a constitutional violation so that he may bring it to the court's attention on habeas corpus. As Judge Fahy stated in his dissenting opinion in this case:

> . . . [T]hose under sentence are not likely to think they can gain an advantage by not appealing in time and later resorting to collateral attack. The scope of review is narrow, and time is not on their side [R. 155].

It is thus clear that allowing collateral attack to correct constitutional errors presents no threat to the appellate process. There is no danger that the appellate process will be atrophied or ignored because of the availability of collateral attack. As a practical matter, allowing habeas corpus in these circumstances allows redress only when an appeal is *not* available.

The majority below apparently rests its ruling (1) on the belief that a decision in petitioner's favor would lead to the filing of many more 2255 motions, further increasing the burden such motions already place on the federal courts, and (2) on the belief that it would be difficult to determine the true facts regarding an alleged coerced confession because no time limit is placed on 2255 motions.

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[17] If a prisoner ever consciously and with full knowledge rejected an appeal in order to bring habeas corpus, habeas corpus would properly be denied because of the waiver of the appellate remedy. The plain fact is, that from the defendant's point of view, there is, and can be, no advantage to habeas corpus over appeal.

The first reason is tantamount to saying that the court will not entertain or grant relief on a meritorious claim because doing so would result in the filing of many unmeritorious claims. This, we submit, an American court should never do. If this reasoning were applied across the board, we would simply have to abolish Section 2255; for, as the majority below points out, less than 4 per cent of all 2255 motions are meritorious. Surely, this is no basis for declining to hear a claim that does have merit.

As to the court's second reason, namely, that it will be difficult to determine which claims are meritorious, the court suggests that, after detention in a federal penitentiary, the prisoner may not be impressed with the risk of committing perjury in framing his petition. "He is frequently advised by a 'jail-house lawyer' who may encourage him to embroider his story or to attack the good faith and diligence of his counsel" (R. 150). The court also suggests that allowing collateral attack would require factual determinations to be made "at a time when recollections may have dimmed and witnesses may have disappeared" (R. 151).

Commonly faced with such difficulties, our courts have always been able to discriminate between truth and falsehood. There are many safeguards against the prisoner's gaining advantage from his own perjury or the passage of time. The burden of establishing his case is on the prisoner; by contrast, in his criminal trial he need only raise a reasonable doubt. In determining the facts, the court must appropriately consider the lapse of time between the prisoner's commitment and his bringing habeas corpus.[17a] The court should also consider any disadvantage resulting to the Government from a delay in bringing a 2255 motion.

[17a] In this case, only three months elapsed (R. 1).

The movant would also be under a duty to explain his failure—if such be the case—to raise the question of his coerced confession at his trial, or his failure—if such be the case—to adduce at trial the evidence which he presents on collateral attack. Finally, the Government has available that most powerful weapon against perjury, cross-examination. These considerations make it clear that the disadvantage, if disadvantage there be, lies with the prisoner who must on collateral attack inevitably find it more difficult to prove his case. With all these safeguards, we cannot assume that prisoners willing to perjure themselves will here find an easy exit from their cells.

The same problems facing a court in determining on collateral attack whether a confession was in fact coerced also face the court in determining whether a plea of guilty was coerced. A plea of guilty may, of course, be attacked collaterally on the ground that it was coerced.[18] The number of prisoners serving sentences under pleas of guilty probably exceeds those who have been convicted after a trial. Yet, these decisions permitting collateral attack of coerced pleas of guilty have not opened the floodgates. The courts have not, so far as we are aware, found any unusual difficulty in determining whether a claim of a coerced plea of guilty is meritorious or spurious. Those accused of crime are not pleading guilty in the hope of obtaining their release on the basis of perjured claims that their plea had been coerced. In short, the spectre raised by the court below is insubstantial. A decision in the prisoner's favor here would not significantly affect the burden on the courts, but it would provide an avenue of relief for those prisoners

[18] E.g. *Waley* v. *Johnston*, 316 U.S. 101 (1942); *Walker* v. *Johnston*, 312 U.S. 275 (1941); *Thomas* v. *United States*, 271 F.2d 500 (D.C. Cir. 1959); *Overman* v. *United States*, 281 F.2d 497 (6th Cir. 1960).

whose unappealed conviction was based on a coerced confession.

* * * * *

Finally, a word should be added concerning the distinction between cases arising under Section 2255 involving federal prisoners and cases arising under Section 2254 involving state prisoners as regards the effect of a failure to take a direct appeal from the conviction or to raise all constitutional issues on the appeal. The effect of a state prisoner's failure to obtain a direct appellate ruling on a constitutional claim before seeking federal habeas corpus has presented this Court with some of its thorniest problems. See *Brown* v. *Allen*, 344 U.S. 443 (1953); *Daniels* v. *Allen*, reported with *Brown* v. *Allen*, 344 U.S. 443 (1953); *Irvin* v. *Dowd*, 359 U.S. 394 (1959). The difficulties—both conceptional and practical—with which this problem bristles are reflected in the rash of scholarly discussions which these decisions have evoked. See, e.g., Hart, "Forward: The Time Chart of the Justices, The Supreme Court, 1958 Term," 73 Harv. L. Rev. 84 (1959); Arnold, "Professor Hart's Theology," 73 Harv. L. Rev. 1298 (1960); Reitz, "Federal Habeas Corpus: Impact of an Abortive State Proceeding," 74 Harv. L. Rev. 1315 (1961). In these eminent and scholarly discussions, the suggestion is made that even in the case of state prisoners this Court has too severely restricted on procedural grounds its review of alleged constitutional deprivations. For example, Judge Arnold has written:

> I submit . . . that rules for governing the allocation of judicial business as between the federal and state courts should not be applied so as to deny a man whose life is at stake a hearing on a constitutional claim [Arnold, *supra*, at 1310].

Whatever may be said of the case of a state prisoner, it should be stressed here that the case of a federal prisoner who brings a 2255 motion is far easier than the state prisoner. The major stumbling block to reviewing a state prisoner's constitutional claim on federal habeas corpus when he has failed to exhaust his state remedies is the delicate balance of state as opposed to federal concerns in a federal system. This balance is specifically written into Section 2254 by an express requirement that relief ". . . shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state . . ." No such balancing is required in the case of a federal prisoner. Here we are dealing with a single judicial system. The problems which frequently arise when two judicial systems share the total administrative burden are wholly absent.

This Court has frequently recognized that "its corrective power over state courts in criminal cases is narrower than that which it exercises over the lower federal courts." *Fikes* v. *Alabama*, 352 U.S. 191, 200 (1957) (dissenting opinion). In reviewing a state conviction, a federal court must be mindful that with "the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution." *Mooney* v. *Holohan*, 294 U.S. 103, 113 (1935). "Power of such delicacy and import [i.e. to review state convictions] must, of course, be exercised with the greatest forbearance." *Watts* v. *Indiana*, 338 U.S. 49, 50 (1949).

But such considerations as these need not concern us in this case. Admittedly, the Court has the power to consider this prisoner's claim of constitutional deprivation. *Bowen* v. *Johnston*, 306 U.S. 19, 26-27 (1939). Only the exercise of the Court's sound discretion is involved. Absent any problems of federalism, the Court is free to "dispose of the party as law and justice require." *United States* v. *Hayman*, 342 U.S. 205, 211 (1952).

III.

Petitioner's Claim Should Be Heard on Collateral Attack Because, as a Practical Matter, No Appellate Remedy Was Available to Him.

We now turn to petitioner's reasons for failing to prosecute a direct appeal from his conviction. Thus far in our argument we have not stressed these reasons. In view of the considerations which we set forth in a footnote,[19] we believe the wiser decision of this Court would permit collateral without a showing of the reasons for failing to take a direct appeal when the basis of the attack is a constitutional deprivation.[20]

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[19] We are aware that this Court normally attempts to base its decision on the narrowest available ground, not the broadest; however, in this case, we believe there are cogent reasons for ruling that collateral attack is available to correct constitutional errors in an unappealed federal conviction, regardless of the reasons for failing to appeal.

In the first place, this issue is presently before the Court on a petition for certiorari in *Lampe* v. *United States*, No. 400 Misc., Oct. T. 1961. In the *Lampe* case an appeal was taken from the conviction, but the defendant failed to raise the constitutional issue which he raised on collateral attack. He offers no reason for failing to raise the constitutional issue on his appeal. Accordingly, the *Lampe* case cannot be disposed of on the narrow ground available here—namely, the petitioner's reasons for not appealing.

Secondly, a reversal in this case based on the petitioner's reasons for failing to appeal will require the development of a jurisprudence defining circumstances in which a failure to appeal will be excused so as to permit collateral attack. Wise judicial administration counsels a decision on the broader question so as, if possible, to avoid needlessly expending judicial energy on the development of the aforementioned jurisprudence. This is especially true since the broader question is a recurring one.

[20] If, however, the Government showed a conscious and deliberate waiver of appeal, collateral attack should not be permitted. See *supra*, p. 26, n. 17.

Whether this Court grounds its reversal on that basis, or whether, in addition, it requires a reasonable excuse for failing to appeal is simply a question of how much the Court will require before considering on collateral attack a prisoner's claim that his conviction was based on a coerced confession. We believe the considerations we have already presented require a court to consider such a claim. The additional considerations we now turn to make the result conclusive.

Petitioner's reasons for failing to appeal from his conviction compel a reversal in this case because, as a practical matter, his direct appellate remedy was simply not available to him. This being his first brush with the law, he knew nothing of his appellate rights or the necessity of filing a notice of appeal within ten days. His attorneys, who had just completed a five-day trial in his defense and who knew that they were not to be compensated for their efforts, failed to advise petitioner of his appellate rights, despite their "strongly felt" belief that an appeal should be taken. This frank admission in sworn statements of petitioner's attorneys leaves no doubt as to these facts.

Thus from petitioner's own personal point of view—and this must be our viewpoint here[21]—an appeal from his

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[21] Traditionally courts have considered the effect that should be given procedural errors in criminal cases from the defendant's own point of view, rather than that of his counsel.

For example, where a court of appeals was unable to find that counsel's failure to file the record on appeal in a criminal case constituted excusable neglect, it nevertheless, *sua sponte*, exercised its power to enlarge the time for filing the record on appeal so as to permit an appeal to be heard. In so doing, the Court stressed that counsel's error should not be visited upon the defendant where serious doubt existed concerning the validity of the conviction. The Court stated:

> . . . [T]he instant case involves substantial questions. This court so ruled in granting bail under Rule 46 (a) (2) of the Federal Rules of Criminal Procedure. And in a criminal case in which a sentence of imprisonment is involved, there

criminal conviction was unavailable. By himself he was incapable of doing anything; during the crucial ten-day period for which the Government seeks to hold him accountable, he was without counsel; and his trial counsel had not even mentioned to him the possibility of an appeal.

As Judge Fahy so forcefully stated in his dissent below:

> I cannot agree the courts must say to the person imprisoned under a basically invalid sentence that the law affords no remedy because, although he did not know and was not advised of his appeal rights, he should have appealed anyhow [R. 155].

The circumstances surrounding petitioner's failure to appeal brings this case well within the ambit of this Court's statement in *Brown* v. *Allen*, 344 U.S. 443, 485-6 (1953):

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is a public interest against denial of consideration on appeal of substantial questions as to the lawfulness of the conviction. For if the conviction is erroneous it is abhorrent to justice that a defendant shall nevertheless suffer such a penalty for the crime charged.

• • • • •

There is nothing in the record to show that the appellant was personally neglectful of the appeal or that he had, prior to their failure to file the record in time or within time to apply for an extension, any reason to doubt that his counsel would give due attention to the appeal. We think that under these circumstances to dismiss the appeal because of counsel's failure to file the record in time and thereby to subject the appellant to imprisonment without consideration of the substantial questions in the case would be a miscarriage of justice which should not be permitted to occur. [*Christoffel* v. *United States*, 190 F.2d 585, 590, 594 (D.C. Cir. 1950).]

Time and again courts have refused in criminal proceedings to construe technical requirements strictly in their attempt to assure that criminal defendants are not denied full consideration of their claims of error. See, e.g., *Boykin* v. *Huff*, 121 F.2d 865 (D.C. Cir. 1941) (holding that a letter addressed to the trial judge constituted the filing of a notice of appeal); *Oddo* v. *United States*, 171 F.2d 854 (2d Cir. 1949) (holding that the time for filing the notice of appeal did not begin to run until the receipt of the notice required by Rule 49 (c), F.R.Cr.P.).

> . . . [F]ederal habeas corpus is allowed where time has expired without appeal when the prisoner is detained without opportunity to appeal because of lack of counsel, *incapacity* or some interference by officials. [Emphasis supplied.]

Thus, if for no other reason than that an appeal was as a practical matter unavailable in this case, the prisoner's claim of constitutional deprivation must be heard.

Conclusion

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 58

JOHN E. HODGES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The *per curiam* majority, and dissenting opinions in the court of appeals (R. 148–161) are reported at 282 F. 2d 858. The opinion of the district court (R. 6–8) is reported at 156 F. Supp. 313.

JURISDICTION

The judgment of the three-judge division of the court of appeals was entered on December 30, 1959 (R. 141). A petition for rehearing was granted on April 15, 1960, and the case was set for rehearing *en banc* (R. 146–147). The judgment of the court of appeals, on rehearing *en banc,* was entered on July 21, 1960 (R. 162). The petition for a writ of certio-

rari was filed on September 14, 1960, and was granted on February 20, 1961 (R. 164). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a proceeding under 28 U.S.C. 2255, petitioner may collaterally challenge, on the ground of involuntariness, the admission of his own confession at the trial—where the issue of voluntariness was initially passed upon by the judge at the trial and then submitted to the jury for resolution on sufficient evidence.

2. Whether, if the admission of the confession into evidence would not otherwise be open to collateral challenge under 28 U.S.C. 2255, it is rendered cognizable in such a proceeding by petitioner's present allegations that his trial attorneys' recommendation for an appeal, made to petitioners' wife on the date of sentence, were not seasonably transmitted to him and that he did not know that notice of appeal was required to be filed within ten days.

STATUTE INVOLVED

The pertinent provisions of 28 U.S.C. 2255 provide:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move

the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

* * * * *

STATEMENT

I

THE TRIAL

In the United States District Court for the District of Columbia, petitioner, his brother Frank A.

Hodges, and Thomas A. Stramer, were charged with the robbery of $4,950, on July 30, 1955, from the cashier of Briggs and Company, in Washington, D.C. (R. 3, 23, 68, 133). On August 30, 1956, petitioner pleaded guilty (R. 3) and was sentenced to a term of 3 to 12 years (R. 1) but on February 7, 1957, he was allowed to withdraw his plea of guilty (R. 1–3).[1] He was tried, commencing on April 10, 1957 (R. 23). A verdict of guilty was returned on April 15, 1957 (R. 151, fn. 4). On May 3, 1957, petitioner, appearing in person and by his two attorneys, was sentenced to a term of 4 to 13 years (R. 1). No notice of appeal was filed.

A. *The hearing on the confession (out of the jury's presence).*

At the trial, before petitioner's confessions, first to police officers and then to the company cashier, were admitted into evidence, the judge conducted a hearing out of the presence of the jury.

1. The following is a summary of the testimony of government witnesses and of the undisputed portion of petitioner's testimony and that of his wife:

At a time prior to July 30, 1955, the date of the robbery, petitioner had been a route salesman for the Briggs Company (R. 23, 67, 76). He was 27 years of age in 1955 and had had a high school education (R. 78). The two men who actually entered the

[1] This was after two *pro se* motions (on file with the Clerk of this Court) for reduction of sentence and to vacate the sentence. Counsel was appointed on the latter motion and thereafter permission to withdraw the plea of guilty was granted.

Briggs company and seized the money at gun-point were identified by the cashier, Parks, as Frank Hodges (petitioner's brother) and Stramer (R. 24).

On April 23, 1956, on the basis of an informant's naming of the three participants, Washington police obtained warrants for their arrest (R. 35–37; and see R. 98–99). Stramer was arrested first. He told the police that petitioner had waited outside in a stolen get-away car and had divided the stolen money with the two who made the entry (R. 36).

A warrant for petitioner's arrest was forwarded to Tampa, Florida, and on April 28 or 29, 1956, the Washington police learned that petitioner had moved to Chicago (R. 36–37). The Chicago police were informed that petitioner was wanted for the robbery and that he was shortly to receive a telephone call at a certain number (R. 25). By means of the telephone number, the Chicago police located petitioner's apartment (R. 25). They went there at about 6:00 o'clock on Sunday evening, April 29, 1956, but did not find him at home until about 9 p.m. (R. 26, 29, and see 87–88). Petitioner admitted them peaceably (R. 30). When the Chicago police arrested petitioner, they told him that he was wanted for robbery in Washington and that an arrest warrant was being sent from Washington (R. 26). Petitioner knew that he was entitled to have a lawyer, having had one in "[s]everal cases" (R. 66, 78, 80–81), but said he did not think about it at the time (R. 66). He expressed willingness to return to Washington voluntarily (R. 28, 70). The arresting officer asked petitioner if he had any

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guns and, if so, where they were. He was directed by petitioner to a suitcase where police found a .32 caliber revolver and ammunition for a .38 caliber revolver (R. 25–26, 67–68).

Pending receipt of the warrant of arrest, petitioner was taken to the Detective Bureau lockup in Chicago (R. 26, 28), arriving there at about 9:30 p.m., on April 29th (R. 26). The arresting officer had some conversation with petitioner as to whether he had committed the robbery and how his address had been learned, but did not investigate the robbery. He had no assignment for such investigation (R. 32–33). The arresting officer did not know whether petitioner was placed in a lineup, but testified that the general procedure was to place people from the lockup in the lineup for possible identification (R. 34). Petitioner admitted that the lineups did not involve excessive lights and that there was "not a word" of questioning (R. 70–71). The line-ups were for the purpose of identification with respect to local crimes (R. 68, 70).

On the next day, Monday, April 30, 1956, at about 5 p.m., the Washington police officer investigating the case received notice at his home of petitioner's arrest in Chicago (R. 37, 46, 104). He did not learn of petitioner's willingness to return voluntarily until the following day, Tuesday, May 1, 1956 (R. 50). On that day, Chicago police received the arrest warrant that had been sent from Washington and at about 1:30 p.m. brought petitioner before the Chief Justice of the Criminal Court in Chicago, where he formally waived extradition and was placed in the custody of

the Sheriff of Cook County pending arrival of the Washington police (R. 26–27, 61). In addition, a commissioner's warrant for petitioner had been obtained in Washington on the morning of May 1, but this warrant was not used (R. 107).[2] The Washington police officers admitted that they preferred having custody themselves so that they could question petitioner (R. 47–48, 50).

The two Washington police officers left for Chicago by plane at 8:00 a.m. on Wednesday, May 2, 1956, and interrogated petitioner at the Robbery Squad headquarters in Chicago that afternoon. He was informed that he was not required to make a statement, and that any statement he made could be used in court. He at first denied participation in the robbery but, when he was informed of his brother's confession and that of Stramer, he told his version of the robbery, which was taken down on the typewriter by one of the officers (R. 40–42, 47, 77–78). The statement was completed at 3:35 p.m. and petitioner was returned to a cell block while the officers arranged for transportation to Washington. Petitioner and his brother agreed to plane travel, which required a delay until the next day for a block of four reservations (R. 42, 79). Petitioner was not interrogated further at the time or on the plane trip to Washington (R. 43, 79). He was, in the words of his own testimony, at all times treated "very nice" by the two officers, and was never abused by them (R. 76–77).

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[2] Washington police did not have authority to send such a warrant to Chicago; that would be the marshal's responsibility (R. 108).

The flight to Washington and transportation to police headquarters there required until about 4:30 or 4:45 of the afternoon of Thursday, May 3, 1956 (R. 44). Cashier Parks, of the Briggs company, was present at headquarters, and upon request of the officers petitioner read the confession to him and again signed it in Parks' presence. Petitioner said nothing to Parks about the confession being untrue and made no complaint about his treatment by the Chicago police as evoking the confession (R. 44–45, 74).

Thereafter, until about 6:30 p.m., petitioner was put through the Identification Bureau procedure, *e.g.*, fingerprinting, photography, and was then placed in a cell block at police headquarters (R. 45, 65). On the next morning, at about 9:30 or 10 a.m., he was arraigned (R. 46, 65).

2. Petitioner and his wife, testifying in the absence of the jury, said that the officers entered their Chicago apartment with drawn guns and without permission (R. 51–52, 57). Petitioner testified that the officers said they had a warrant (R. 68); but compare R. 125 (before the jury), "they said they had some warrant coming down". He said that the Chicago police questioned him four times about the robbery, urging him to confess, the longest periods up to 30 to 45 minutes, and that on three occasions they placed him in a line-up of ten or fifteen minutes duration for possible identification for local offenses, including one lineup at 2:30 in the morning (R. 57–61, 71). He did not attempt to telephone for a lawyer, but once asked to telephone his wife and was denied permission to do

so (R. 61). Petitioner's wife testified that, when petitioner was arrested, the Chicago police would give her no information but one officer "slipped" her a telephone number to call which proved to be a police precinct (R. 52–53). She did not learn until Wednesday (May 2) that he was in jail and then was told that there was no point to her coming down since petitioner was to be extradited (R. 53).

Petitioner said that he made no admissions to the Chicago police (R. 71). He testified (on cross-examination, not direct)[1] that Chicago police, on three occasions, "roughed" him up a little bit with their hands; that they hit him in the stomach, and slapped him on the back of the neck, and the side of the head. With respect to the only Chicago officer present at the trial, Officer Fitzgerald, who had taken him into custody, petitioner made no such accusation (R. 72). He testified that when he first told the Washington police that he would not sign a confession they said that they would have to turn him back to the Chicago police (R. 73, 80).

3. Upon the conclusion of this testimony outside the presence of the jury, the trial judge ruled that the confessions were admissible. He ruled that there had not been substantial credible evidence of improper arrest or of unnecessary delay in arraignment to render the confessions inadmissible as a matter of law and that he would submit to the jury the issue of whether the confessions were voluntarily made (R. 82).

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[1] He did not repeat the accusation when he testified before the jury.

B. *The trial testimony and the instructions to the jury on the voluntariness of the confessions.*

1. The testimony on the voluntariness of the confessions presented to the jury was substantially as given before the judge (R. 83–132), but petitioner did not repeat his prior assertion that Chicago police "[r]oughed [him] up a little bit" (see *supra*, p. 9). Petitioner testified that he slept on the floor on May 1st in the Cook County jail, but that he was not singled out in this respect ("No bed available. More than me sleeping on the floor. Not just me" (R. 122)). There was testimony that, at the time of the arrest, Chicago Officer Fitzgerald told petitioner he could get a lawyer in Chicago if he chose not to waive extradition (R. 94–95).

Petitioner, before the jury, did not mention one alleged 2:30 p.m. questioning by the Chicago police on April 30 to which he had testified in the absence of the jury (R. 60), and he added one 7:00 p.m. questioning (R. 119–120) and two additional appearance in lineups at 1:30 p.m. and 2:00 a.m., respectively (R. 119–120).

2. The trial judge included in his charge to the jury the following instructions concerning the confessions (R. 139–140):

> The law does not admit, however, a confession taken by duress, by coercion, by force, or as a result of an inducement or as a result of getting a person to make him confess.
>
> In that connection the Court further instructs you that a confession, if you so find this confession to have been, obtained by these means, must be rejected and disregarded by the jury.

Human experience has also shown that it has happened that persons have admitted the commission of a crime when they have not in fact committed it, as a result of force which has been exerted against them.

In other words, I repeat, human experience has shown that it has happened a person has admitted the commission of a crime which they have not in fact committed, as a result of force exerted against them.

If you find that the defendant Hodges' confession was made under duress and obtained by coercion and force or by inducement or promises or by baiting him, then you must disregard the confession.

If the jury has a reasonable doubt as to whether the confession was voluntary, then they must reject it.

In other words, you are the exclusive judges of all of the facts surrounding this alleged confession which the officer said he obtained from the defendant.

If it was a voluntary confession as I have explained the meaning of that word, then you may accept it. If it was involuntary or made for any reason which I have included in the charge, then it must be rejected.

Is that satisfactory to counsel?

Mr. CAREY [defense counsel]: Yes.

II

THE PROCEEDINGS UNDER 28 U.S.C. 2255

A. *In the district court.*

On August 20, 1957—about 3½ months after sentencing—petitioner filed a motion under 28 U.S.C.

2255, by two newly engaged attorneys, in which it was alleged that he was "questioned continuously, beaten physically and subjected to psychological as well as physical torture" by the Chicago police, "with the result that he made a statement demanded by the Chicago police but refused to sign it" and that petitioner had waived extradition and made a confession to Washington police under their "threat of handing him back over to the Chicago Police for further mistreatment and abuse." He alleged that his rights under the Constitution and laws were violated (citing *inter alia,* Rule 5 of the F.R. Cr. P., *McNabb* v. *United States,* 318 U.S. 332, and *Mallory* v. *United States,* 354 U.S. 449). No complaint was made as to petitioner's former counsel, either in their conduct of the trial or with respect to any failure to advise or take an appeal from the judgment of May 3, 1957 (R. 1–3). The government, in opposition, urged that issues with respect to the sufficiency of evidence must be raised by appeal rather than under 28 U.S.C. 2255 (R. 3–5).

The order of the district court denying the motion recites that there was an oral hearing on October 25, 1957, with counsel on both sides present (R. 6). The court entered findings of fact[4] as to the time of petitioner's arrest and found also that the confession was voluntary and not coerced (R. 6). Its conclusions of law were directed to the contention of

[4] It does not appear on what these findings were based. There seems to have been no testimony taken at the hearing but merely argument of counsel. Presumably, the findings were based on the court's recollection of the trial and counsel's statements.

the defendant that the "confession which allegedly resulted from an unlawful detention invalidated the conviction and sentence" (R. 7). As to this, the court held that a motion under 28 U.S.C. 2255 is an "extraordinary remedy," not available for raising an error of law in the admission of evidence after lapse of the time for appeal (R. 7), and that the issue under the *Mallory* case was not a constitutional issue cognizable on collateral challenge (R. 8). Accordingly, the court denied the motion to vacate sentence (R. 8).

B. *In the court of appeals.*

Upon appeal from the denial of relief under 28 U.S.C. 2255, it was discovered (on May 18, 1959) that the notes of the hearing of October 25, 1957, had been lost. The court of appeals denied a motion to remand for rehearing and ordered the transcript *of the trial* prepared at government expense (R. 12–13), stating that "the issues on this appeal can be adequately determined by reference to the transcript of the trial proceedings" (R. 12).

On August 4, 1959, petitioner moved, *inter alia,* that the record be supplemented by adding the affidavits of petitioner and his trial counsel seeking to explain the failure to appeal from the conviction. The trial attorneys' affidavit alleged that petitioner's wife had requested them to defend petitioner; that neither petitioner nor his wife were able to pay a fee; that petitioner was found guilty on April 15, 1957, and sentence was imposed on May 8, 1957;[5] that imme-

[5] The actual date was May 3, 1957.

diately "after sentence" petitioner was removed from the courtroom and counsel "did not have an opportunity to talk to him"; that counsel did not "recall" discussing the "taking" of an appeal with petitioner, but after the sentencing proceedings they talked with petitioner's wife in the courtroom and advised her that counsel strongly felt that she should have petitioner prosecute an appeal; that she indicated that she would discuss it with petitioner and would suggest that he request court-appointed counsel to present an appeal; and that counsel did not learn until "some time" later, after time for appeal had expired, that petitioner had not taken an appeal (R. 15–16).

Petitioner's affidavit alleged that this was his first arrest other than for "minor traffic violations"; that he was "not versed in the law"; that he did not "recall" having any conversation whatsoever with "Edward L. Carey or John L. Kilcullen" (his trial counsel) concerning the taking of an appeal; that he did not know he had only ten days to appeal; that subsequently his wife visited him at Lorton Reformatory and "mentioned" an appeal; that it was "at this time" too late to file; that he did not know his wife's present occupation or address; that he did not find out "until later" the "actual" time limit within which to appeal. He said that this was when he discussed his legal situation with new counsel (Mr. Taylor) and retained him; and that he retained the new counsel as soon as he possibly could after he had been convicted and sentenced (R. 15). On August 28, 1959, the court of appeals denied, *per curiam,* the motion to supplement the record or to remand (R. 22).

On December 30, 1959, a three-judge division of the court of appeals sustained the district court's denial of relief under 28 U.S.C. 2255 (R. 141–146). In the court of appeals, the claim was that such relief was available because the confession was coerced (R. 142). The opinion of the panel was that "the right of appeal may not be abandoned and resort had to section 2255 whenever the conviction rests on evidence admitted at the trial in violation of a constitutionally protected right" (R. 145). The court noted that no reason was advanced for failure to appeal from the judgment and the "facts of the case do not lead us to hold that, nevertheless, justice requires that appellant should be granted relief" (R. 146).

A petition for rehearing was duly filed, and on April 15 , 1960, the court granted it and set the case for rehearing *en banc* (R. 146). Counsel were directed to discuss the following question (R. 146–147):

> Whether appellant, either in the affidavits filed in this court or otherwise, has made such a showing as to entitle him to a hearing in the District Court on the question whether, notwithstanding his failure to appeal directly from the judgment of conviction, he is entitled to a hearing in the District Court on the right he claims to attack collaterally under 28 U.S.C. § 2255 (1958) the validity of the judgment of conviction on the basis of the admission in evidence of an alleged coerced confession.

On rehearing, the majority held that admission of a confession at a plenary trial is not subject to collateral challenge under 28 U.S.C. 2255, and that an exception was not to be afforded upon the basis of

"mere neglect in taking an appeal—excusable or not" (R. 151). The judgment was affirmed (R. 148, 162). Three judges, concurring in part and dissenting in part, considered a remand required to determine the truth of petitioner's alleged excuse for failure to appeal and whether the confessions were involuntary as a matter of law (R. 153).

SUMMARY OF ARGUMENT

I

A. Petitioner's brief is founded upon the oft-repeated statement of this Court that the use of a coerced confession violates due process—without sufficient analysis of the concepts which that general statement embodies. The use of a confession which is in fact coerced undeniably does violate due process, but a defendant's allegation that a confession is coerced does not make it such. Nor is it a violation of due process for a district judge to take testimony on the issue and to find that there is a conflict in the evidence warranting resolution by the jury under the federal rule;[6] and it is certainly not a violation of due process for a jury to resolve issues of credibility against the defendant so as to find that there was no coercion. Where the evidence adduced at a trial shows that the issue of whether a confession was coerced or not depends upon disputed factual issues, as in this case, no violation of due process could be involved in submission of the issues to the

[6] In the federal courts, the judge does not decide for himself whether the confession was in fact voluntary or coerced, but determines only that there is enough evidence for the jury to find it voluntary.

jury. Even on direct review, the question of whether a confession is coerced and therefore constitutionally vulnerable does not call for determination of disputed facts or issues of credibility by the appellate court, but is determined on the basis of the undisputed facts in the record. All disputable issues are resolved by the jury.

B. For this reason, where there is no attack on the fairness of the procedure at the trial, the only issue as to voluntariness which could possibly be open on collateral attack under Section 2255—if any issue is open at all with respect to confessions alleged to be coerced—is whether the trial court committed legal error in permitting the confession to be admitted in evidence and in submitting the issue of voluntariness to the jury. That question is to be decided on the basis of the trial record, and not after a new evidentiary hearing.

This Court has decided, with respect to federal habeas corpus actions challenging the validity of a state conviction on the ground that a coerced confession was used at the trial, that, in the absence of special circumstances, review of the issue of coercion should ordinarily be on the basis of the trial record. Among the factors noted as supporting such a ruling is the tendency of the passage of time to evoke new versions of the facts, and the desirability of having the issue of voluntariness tried in the "whole, living complex of a criminal trial". *Brown* v. *Allen,* 344 U.S. 443, 468, 506; *Rogers* v. *Richmond,* 365 U.S. 534, 547–549. These practical considerations apply to federal as well as state trials. This very case indicates how the fact of conviction and the lapse of time can result

in deliberate or unconscious embellishment of facts, for petitioner's motion under 28 U.S.C. 2255 made allegations of fact going beyond those to which petitioner himself testified at the trial. Particularly in relation to federal trials, where the federal constitutional issues are decided in the first instance by a federal court, there is no need for a new evidentiary hearing under 28 U.S.C. 2255 and a new trial of the facts.

C. Petitioner's motion under 28 U.S.C. 2255, drawn by counsel, was not based on the trial record, but attempted to set forth new facts and to call for a new evidentiary hearing. There was no allegation that the undisputed evidence at the trial showed coercion, and it was not said that there was an absence of evidence from which the judge or jury could find voluntariness. Indeed, the trial record demonstrates conclusively that such allegations could not properly be made. Even petitioner's own testimony at the trial does not establish coercion but supports the inference that he confessed because he knew that his companions had told the whole story and had implicated him. When to petitioner's own testimony there is added the testimony of government witnesses categorically denying any threats, and other evidence contradicting petitioner's statements, it is clear that the trial judge committed no error in permitting the issue of voluntariness to go to the jury. On this basis, we think this case can be disposed of on the simple ground that the files and records conclusively show that this prisoner is entitled to no relief even if the

question of coercion is normally cognizable under Section 2255.

II

A. If the Court finds it necessary to go beyond the point discussed above and reach the general question whether the legal ruling of a federal court that a confession may be admitted into evidence is normally reviewable under 28 U.S.C. 2255—and, for the reasons given in Point I, *supra,* the ruling would only be reviewable on the trial record—it is the government's position that, absent a showing of special circumstances, that decision of law is reviewable only on appeal and not collaterally. There is no reason why a federal trial court acting under Section 2255 should review the ruling on admissibility made by the same federal court at the trial.

It is true that this Court has held that, as to state convictions, collateral attack by way of habeas corpus in the federal courts is available to consider whether (on the trial record) the use by a state of an allegedly coerced confession violates due process. However, if habeas corpus were not available the only federal court which could pass on the voluntariness of the confession would be this Court which is faced with many practical difficulties, described in *Brown* v. *Allen,* 344 U.S. at pp. 489–502, in dealing with such issues on direct review of state convictions. It has therefore been felt, in view of the Congressional intent manifested since 1867 when federal courts were authorized to issue a writ of habeas corpus to prisoners in state custody in violation of the Constitution, that federal habeas cor-

pus should be available to test the use of a confession by state courts.

The situation with respect to the use of a confession at federal trials is different. The trial takes place in a federal forum. The same principles are applied by the courts both at the trial and appeal (on the one hand) and on motion under 28 U.S.C. 2255 (on the other). To permit the admission of the confession to be reviewed under 28 U.S.C. 2255 would be in effect to grant a long delayed petition for rehearing or to permit the motion to vacate to be used as a substitute for an appeal. That would be contrary to established principles in this field which stress the use of the appellate route.

B. Even as to certain issues which go to jurisdiction in the narrow sense of that term, it has been held that a trial ruling should normally be reviewable only by appeal where disputed matters of law are involved. Hence, even if it be said that the admission of a confession is a matter which goes to jurisdiction in the expanding sense in which that term is now often used, it does not follow that the question is cognizable collaterally rather than by direct appeal. On the contrary, the admissibility of a confession is not an issue going to the heart of the authority of the district court to try the criminal case—the fundamental sense of "jurisdiction"—but is an evidentiary problem normally turning on particular facts as viewed in the context of the criminal trial. Under the decisions of this Court, it is peculiarly the type of question which should, absent special circumstances, be reviewable only on appeal.

III

A. We agree that special circumstances may sometimes justify resort to collateral attack even though the issue raised is not one normally cognizable in collateral proceedings. Failure to appeal may possibly be such a circumstance, even where the government is not at fault. However, we do not believe that petitioner has made a sufficient showing to justify treating his case as falling within any such exceptional category.

Since petitioner did not offer any excuse for his failure to take an appeal until the case was in the court of appeals after denial by the district court of his motion under 28 U.S.C. 2255, the issue comes before this Court in an unsatisfactory manner, by affidavit rather than after hearing. Considering the lateness of the affidavits and the fact that counsel would be likely to present the version most favorable to petitioner, we think that the court of appeals was justified in ruling that no purpose would be served by a further evidentiary hearing on the reasons for petitioner's failure to appeal. The present affidavits are too cautiously worded to carry the conviction that failure to appeal was really the result of petitioner's ignorance. Moreover, at most, the allegations amount to the statement that the person to whom petitioner had entrusted the obtaining of trial counsel, his wife, had failed to inform him of the requirement that he obtain new counsel for an appeal. There was at most only "neglect" to take an appeal—neglect, neither by the government nor

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by petitioner's counsel, but by petitioner's wife acting for petitioner. The law cannot so lightly absolve persons from responsibility for the neglect of their own agents.

B. In any event, there is no occasion for a further hearing on the circumstances of petitioner's failure to appeal. Whether review be by direct appeal or by collateral attack, the only question would be—as we have shown—whether on the basis of the undisputed facts in the trial record there was coercion or an absence of evidence of voluntariness. Since, on this trial record, it is so clear that the issue of voluntariness involved conflicting testimony for the jury to resolve, no purpose would be served by a remand to decide whether a collateral challenge may properly be brought because of petitioner's failure to appeal.

ARGUMENT

INTRODUCTION

Since this case presents a particular problem as to the scope of relief cognizable under 28 U.S.C. 2255—a general question of continuing importance in the administration of federal criminal law—it is essential that the precise issues presented by this record and this petition be clearly delineated, at the outset, within the broader framework of collateral challenge to an allegedly coerced confession.

A. Petitioner categorically assumes that a federal criminal conviction is subject to collateral attack upon the ground that it is based upon a coerced confession and therefore asserts that the question is "whether this right collaterally to attack his federal

conviction based on a coerced confession is extinguished by his failure to appeal directly from his conviction" (Br. 2, 12–13). We emphatically disagree. The assertion that a conviction "based on a coerced confession" is subject to "collateral attack" is too broad and too ambiguous to be helpful as a predicate for the analysis of the present case. "[B]ased on a coerced confession" assumes a certainty about both facts and their legal characterization which is utterly unreal. On collateral attack of his conviction the defendant may be presenting any of a variety of situations. At least three sharply distinguishable situations deserve present notice:

(i) The confession may be admittedly or incontrovertibly coerced. This is obviously a rare situation.

(ii) The defendant may be asserting that he was convicted upon a record which shows that as a matter of law (*i.e.*, upon the undisputed evidence), although the question of law is disputed, the confession was coerced. This is the familiar case presented by habeas corpus to review state convictions.

(iii) The defendant may be asserting that, although the issue is disputed, he will introduce evidence at a new hearing proving that the confession used to convict him was in fact coerced. In this situation the facts concerning the confession might or might not have been put in issue at the trial. Normally, as in the present case, this same question of fact will have already been put in issue and resolved against the defendant at his trial, by the judge and jury. He may or may not have exhausted his remedies upon appeal.

Each of these different situations might conceivably be governed by separate rules. We are willing to assume with petitioner that a conviction based upon an admittedly coerced confession may be voided whenever that fact clearly appears. It is our view, however, that in the third situation above the defendant does not show a violation of any constitutional right where the disputed issue of coercion was presented and resolved at the trial under fair procedure. Due process of law is satisfied by a trial procedure which affords the defendant a full and fair opportunity to submit the factual issues concerning his confession to the judge or jury, or both successively, under circumstances such that the confession is excluded from the jury's consideration unless found to be voluntary.

The second, intermediate, situation referred to above presents narrower questions. Although *a priori* it might have been argued that a state satisfied the due process clause of the Fourteenth Amendment if it established a fair procedure for litigating the facts concerning a confession and provided for a fair judicial determination of whether, upon the undisputed or established facts, it was coerced, it is now an established principle of our federalism that a defendant is entitled to have a federal court decide a claim of constitutional right (*i.e.*, whether the proper constitutional standard was applied to the facts). To make this right real in the face of the pressure of business upon this Court, the remedy of habeas corpus in the inferior courts was deemed available in addition to certiorari or appeal. A different question, how-

ever, is presented when the trial was held in a federal court where *ex hypothesi* there is a federal determination of the question of constitutional law.

This question, we submit, need not be decided in the present case. This case falls in the third category; petitioner is seeking to relitigate factual issues concerning his confession which were resolved against him at his trial; no claim is or has been made that the trial procedure was in any way defective or that the instructions to the jury were incorrect; nor is there any claim of newly discovered evidence. Petitioner is simply seeking to retry the issue in a new evidentiary hearing; and that contention must be squarely rejected. In addition, this is not a case in which there can be a fair difference of opinion, on the trial record, as to whether the confession was admissible; it is indisputable that there were controverted factual issues which should properly be sent to the jury and that the trial judge was plainly correct in admitting the confessions and then submitting the question of voluntariness to the jury. Accordingly, the present case can be disposed of on the limited ground that the records and files conclusively prove that petitioner has no cause of action under 28 U.S.C. 2255.

B. Beyond that, if the more general question is reached as to whether, in the absence of extraordinary circumstances, the claim of the use of a coerced confession at a federal trial is cognizable at all by motion under Section 2255, it is the government's view that in the normal situation such an error can be reviewed

only on appeal. We think that, unlike state convictions, collateral review of that issue is not required or appropriate for federal convictions—at least in the absence of special circumstances—even though there is no new evidentiary hearing and the review is based on the trial record. The considerations applicable to federal review of state convictions upon a writ of habeas corpus are quite different from those relevant in deciding whether habeas corpus or a motion under 28 U.S.C. 2255 is available to review a state conviction in a federal court. See pp. 41–43, 47–52, below.

In the narrower aspect of his argument, petitioner contends that, even though the issue of the admissibility of the confessions could not normally be reconsidered in a proceeding under 28 U.S.C. 2255, it should be so reconsidered if petitioner can show that his failure to appeal was excusable. Our position on this point is that a mere showing of excusable neglect is not a reason for rendering that issue, not otherwise cognizable under 28 U.S.C. 2255, properly litigable in such a proceeding. In any event, if it is so cognizable the only relief to which petitioner would be entitled would be the review he would have had on appeal, *i.e.*, a determination of whether, on the trial record, the trial court erred as a matter of law in permitting the confession to be received in evidence and submitting the issue of voluntariness of the jury. As we have indicated, we think that, on this record, it is so clear that the trial judge did not err that there is no need to remand the case for further proceedings under Section 2255, even if the issue is deemed cognizable.

C. Consideration and resolution of this series of issue must be made to fit, not only the pattern of the terms and objectives of Section 2255, but also into the larger context of the proper administration of criminal justice in the federal system. There are, on the one hand, the significant principles that conviction and punishment should not be sustained where violation of constitutional (or other basic rights) is proved, and that due opportunity for such proof should be available. On the other hand are the important contrasting factors that criminal justice should not be unduly delayed, that appropriate finality in litigation is to be encouraged, and that unnecessary relitigation is a public and private drain. Solution of the problems of collateral attack on federal criminal judgments, such as those raised in this case, must take account of these competing values.

I

SINCE THE ADMISSIBILITY OF PETITIONER'S CONFESSION WAS RAISED AND DETERMINED AT THE TRIAL (AS TO WHICH NO CLAIM OF DEFECT IN PROCEDURE IS MADE), AND THE TRIAL COURT'S RULING ON ADMISSIBILITY WAS CLEARLY CORRECT ON THE RECORD MADE AT THE TRIAL, THE ISSUE CANNOT BE RETRIED UNDER 28 U.S.C. 2255

A. *Even on direct review, the question whether a confession is coerced, and therefore constitutionally vulnerable, does not involve resolution of issue of credibility by the appellate court but is determined on the basis of the undisputed facts.*

The issue of the scope of collateral attack on a confession is so bound up with the general principles

governing confessions that it is well to start our discussion with a summary of the rules on the admissibility of confessions at a federal trial and the direct review by appellate courts of the trial rulings thereon.

1. The admissibility of a federal confession is in the first instance a question of law for the court.[1] To determine that issue the trial court is under an obligation, upon request, to hold a hearing outside the presence of the jury at which the defendant may testify specifically on the circumstances surrounding the making of the confession (without necessarily taking the stand at the trial on the issue of guilty or innocence). *United States* v. *Carignan*, 342 U.S. 36, 38. However, in the words of this Court in *Wilson* v. *United States*, 162 U.S. 613, 624, "When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant." The judge does not decide for himself whether the confession was in fact voluntary; he decides only that there is enough evidence for the jury to find lack of coercion, and submits that question to the jury. This is the procedure fol-

[1] The question is really a mixed one of law and fact since it involves the application of a general principle to a particular set of facts. However, for the purposes of this brief, it seems easier to characterize the decision of admissibility made by the court as the determination of an issue of law, and we do so throughout.

lowed generally in the federal courts[6] and specifically in the District of Columbia, where this case arose. The Court of Appeals for the District of Columbia Circuit recently stated the applicable principles in *Wright* v. *United States*, 250 F. 2d 4, 13, as follows:

> In this jurisdiction, however, by "law and practice", the court first holds a preliminary hearing for the purpose of determining whether there is evidence from which the jury could properly conclude that the confession was voluntary. If the court concludes there is no such evidence, it must exclude the confession; but if it finds there is evidence on the basis of which it might be held to be voluntary, then the question of voluntariness is submitted to the jury.

See also *McAffee* v. *United States*, 111 F. 2d 199, 200–201 (C.A.D.C.), certiorari denied, 310 U.S. 643. That was the procedure followed at the trial of petitioner's case.

2. Since it is not the function of an appellate court to resolve conflicts in evidence, it necessarily follows that, where the admissibility of a confession is challenged on direct appeal, the question for the appellate court is whether it was an error of law to permit the confession to be received in evidence and (if the issue is raised before the jury) to submit the issue of voluntariness to the jury. In other words, the problem before the appellate court is whether on the *undis-*

[6] *Denny* v. *United States*, 151 F. 2d 828, 833 (C.A. 4), certiorari denied, 327 U.S. 777; *Malaga* v. *United States*, 57 F. 2d 822 (C.A. 1); *Hale* v. *United States*, 25 F. 2d 430, 438 (C.A. 8); *Dyson* v. *United States*, 283 F. 2d 636, 638 (C.A. 9).

puted physical facts the confession was involuntary as a matter of law. Since the issue of coerced confessions has in recent years arisen much more frequently in state than in federal cases, the duty of an appellate court with respect to rulings on confessions has been most explicitly articulated with respect to state trials. For example, in *Lisenba* v. *California,* 314 U.S. 219, 237–238, the Court said:

> Where the claim is that the prisoner's statement has been procured by such means, we are bound to make an independent examination of the record to determine the validity of the claim. The performance of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury, or both. If the evidence bearing upon the question is uncontradicted, the application of the constitutional provision is unembarrassed by a finding or a verdict in a state court; even though, in ruling that the confession was admissible, the very tests were applied in the state court to which we resort to answer the constitutional question.
>
> There are cases, such as this one, *where the evidence as to the methods employed to obtain a confession is conflicting,* and in which, although denial of due process was not an issue in the trial, an issue has been resolved by court and jury which involves an answer to the due process question. *In such a case we accept the determination of the triers of fact, unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process.* [Emphasis added.]

These principles, again with relation to a state case, were recently reaffirmed in Mr. Justice Frankfurter's opinion in *Culombe* v. *Connecticut*, 367 U.S. 568, 603–604:*

> The inquiry whether, in a particular case, a confession was voluntarily or involuntarily made involves, at the least, a three-phased process. First, there is the business of finding the crude historical facts, the external, "phenomenological" occurrences and events surrounding the confession. Second, because the concept of "voluntariness" is one which concerns a mental state, there is the imaginative re-creation, largely inferential, of internal, "psychological" fact. Third, there is the application to this psychological fact of standards for judgment informed by the larger legal conceptions ordinarily characterized as rules of law but which, also, comprehend both induction from, and anticipation of, factual circumstances.
>
> In a case coming here from the highest court of a State in which review may be had, the first of these phases is definitely determined, normally, by that court. *Determination of what happened requires assessments of the relative credibility of witnesses whose stories, in cases involving claims of coercion, are frequently, if indeed not almost invariably, contradictory. That ascertainment belongs to the trier of facts before whom those witnesses actually appear, subject to whatever corrective powers a State's appellate processes afford.* [Emphasis added.]

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* Mr. Justice Stewart joined in this opinion, and Mr. Justice Harlan, Mr. Justice Clark, and Mr. Justice Whittaker appear to have agreed with the portion of the opinion which we quote. See 367 U.S. at 642.

> This means that all testimonial conflict is settled by the judgment of the state courts. Where they have made explicit findings of fact, those findings conclude us and form the basis of our review—with the one *caveat,* necessarily, that we are not to be bound by findings wholly lacking support in evidence. See *Thompson* v. *Louisville,* 362 U.S. 199. Where there are no explicit findings, or in the case of *lacunae* among the findings, the rejection of a federal constitutional claim by state criminal courts applying proper constitutional standards [footnote omitted] resolves all conflicts in testimony bearing on that claim against the criminal defendant. In such instances, we consider only the uncontested portions of the record: the evidence of the prosecution's witnesses and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted. * * *

See also *Thomas* v. *Arizona,* 356 U.S. 390, 402–403, pointing out that this Court "time and again" has "refused to consider disputed facts when determining the issue of coercion."

While no opinion of this Court has spelled out the rule in equal detail with respect to federal convictions, the decisions of the Court do show that the same rule is applied to federal as well as state cases. Thus in *Wan* v. *United States,* 266 U.S. 1, 16–17, the opinion indicates that the question before this Court was whether there was an issue "upon which the jury could properly have been required or permitted to pass." And in *McNabb* v. *United States,* 318 U.S. 332, 338–339, fn. 5, the Court, after pointing out that

the "issue of law" which was decided by the trial court in admitting the statements did not become a question of fact foreclosed by the jury's verdict, stated that it was treating as facts "only the testimony offered on behalf of the Government and so much of the petitioner's evidence as is neither contradicted by nor inconsistent with that of the Government." See also *Anderson* v. *United States,* 318 U.S. 350, 351, fn. 1, where the Court stated that it would assume as facts "only the testimony of Government witnesses and so much of the petitioners' evidence as is uncontradicted." And see the decisions of lower courts applying to claims of coerced confessions, at federal trials, the standard laid down by this Court in *Lisenba* v. *California, supra. Dyson* v. *United States,* 283 F. 2d 636, 638 (C.A. 9); *Denny* v. *United States,* 151 F. 2d 828, 833 (C.A. 4), certiorari denied, 327 U.S. 777.

As the *McNabb* decision shows, this Court may, in relation to federal trials, lay down standards of admissibility on non-constitutional grounds which it would not apply to state trials. We may assume that, in scrutinizing the record with respect to a confession, it could question the inferences drawn by a trier of fact very closely, more closely than it might be willing to do in state cases. But with respect to federal as well as state trials, neither this Court nor a court of appeals is in a position to decide disputed issues of fact or to resolve questions of credibility. That necessarily must be determined by the trier of fact. With respect to a confession, as with respect to a verdict of guilt generally, it is not the function of

the appellate court "to weigh the evidence or to determine the credibility of witnesses." *Glasser* v. *United States,* 315 U.S. 60, 80. See also *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 254.

It is in the light of these principles that the general statements of this Court upon which petitioner so heavily relies—to the effect that the use of a coerced confession violates due process—must be considered. Unquestionably, the use of a coerced confession violates due process, but a defendant's mere allegation that a confession is coerced does not make it such. It is not a violation of due process for a district judge to find that there is a conflict in the evidence and it is not a violation of due process for a jury to resolve issues of credibility against a defendant. Hence, where the evidence adduced at the trial shows that the issue of whether a confession was coerced or not depends upon resolution of factual issues, no violation of due process is involved in the submission of the issue to the jury. Only if there was no evidence to support a finding of absence of coercion, or if the *undisputed facts* show coercion as a matter of law, does the admission of a confession constitute a violation of constitutional rights.

B. *Where there is no attack on the fairness of the procedure at the trial, the only issue as to voluntariness which could possibly be open on collateral attack is whether the trial court committed legal error in permitting the confession to be admitted in evidence. No new evidentiary hearing would be required.*

We have pointed out that, even on direct review, an appellate court does not undertake to resolve is-

sues of credibility, but determines the constitutional question involved in the admission of a confession on the basis of undisputed facts. It seems clear to us—and indeed this Court has so decided with respect to state cases—that, if the admissibility of a confession at a federal trial is open to collateral challenge at all (an issue we discuss in Point II, *infra,* pp. 45 *ff*), the only question which could possibly be open would be whether the trial court erred as a matter of law, on the undisputed physical facts, in permitting the confession to go into evidence and the jury to pass on the issue of voluntariness. That question must necessarily be decided on the basis of the trial record, and not after a new evidentiary hearing, in the proceeding under 28 U.S.C. 2255. A different issue would, of course, be presented, if there were a claim that a petitioner had in some respect been denied the opportunity to test the voluntariness of the confession at the trial, but that question is not here since this petitioner does not and cannot make any such claim.

1. One of the few clear principles with respect to the scope of collateral challenge to federal convictions, by habeas corpus or its substitute under 28 U.S.C. 2255, is that it is not the regular function of the remedy to retry issues of fact which have been submitted to and resolved by the jury. See *Harlan* v. *McGourin,* 218 U.S. 442, holding that insufficiency of the evidence to establish guilt was not cognizable on habeas corpus. As this Court pointed out in its discussions of the scope of collateral review, both in *Sunal* v. *Large,* 332 U.S. 174, 177–179,

and *Bowen* v. *Johnston*, 306 U.S. 19, 25, even as to issues which are jurisdictional in the strictest sense of that term, review by habeas corpus has been refused where the question of jurisdiction was determined by the trial court upon the resolution of issues of fact. Thus, as stated in *Bowen*, 306 U.S. at p. 25:

> Where on the face of the record the District Court has jurisdiction of the offense and of the defendant and the defendant contends that on the facts shown the crime was not committed at a place within the jurisdiction of the United States, we have held that the judgment is one for review by the Circuit Court of Appeals in error proceedings and that the writ of habeas corpus is properly refused. *Toy Toy* v. *Hopkins*, 212 U.S. 542, 549. * * *

See also the statement in *Bowen* at p. 27, that courts should not normally exercise the power to re-examine jurisdictional issues on habeas corpus "where there are essential qustions of fact determinable by the trial court."

In accordance with these principles, lower federal courts have held that, even where an issue is raised which, if undetermined, would clearly be cognizable under 28 U.S.C. 2255 (*e.g.*, competency to stand trial), such a question will not be re-examined on motion under 28 U.S.C. 2255 where the trial court did in fact consider the issue and decide it adversely to the defendant. *E.g.*, *Hill* v. *United States*, 223 F. 2d 699 (C.A. 6), certiorari denied, 350 U.S. 867 (competency); *United States* v. *Coleman*, 230 F. 2d 261 (C.A. 3) (use of perjured testimony).

These principles apply to this case. Whether or not *any* issue with respect to the confession is cognizable under 28 U.S.C. 2255, the issues of fact which were tried before the court and submitted to the jury may not be re-examined on the motion. In short, there can in no event be a new evidentiary hearing on the facts—absent a proper claim of newly discovered evidence. The only issue which can be open—if any issue is open at all—is whether, as a matter of law, the court erred, on the trial record, in permitting the confession to go into evidence and in submitting the issue of voluntariness to the jury.

2. This Court has already decided, with respect to federal habeas corpus actions challenging the validity of a state conviction on the ground that a coerced confession was used at the trial, that in the absence of special circumstances review of that issue should ordinarily be on the basis of the trial record. In *Brown* v. *Allen*, 344 U.S. 443, a leading case holding that the state's use of a confession at a trial could be reviewed by habeas corpus in a federal district court, this question was fully discussed under the heading "Right to Plenary Hearing", 344 U.S. at pp. 460–465. The opinion states (at p. 463):

> Where the record of the application affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and no unusual circumstances calling for a hearing are presented, a repetition of the trial is not required. * * *

That the issue is one of law (and not one of fact, requiring a new hearing) is also made clear by the

opinion of Mr. Justice Frankfurter in the *Brown* case, 344 U.S. at p. 506:

> When the record of the State court proceedings is before the court, it may appear that the issue turns on basic facts and that the facts (in the sense of a recital of external events and the credibility of their narrators) have been tried and adjudicated against the applicant. Unless a vital flaw be found in the process of ascertaining such facts in the State court, the District Judge may accept their determination in the State proceeding and deny the application. On the other hand, State adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide.
>
> A State determination of the historical facts, the external events that occurred, may have been made after hearing witnesses perhaps no longer available or whose recollection later may have been affected by the passage of time or by the fact that one judicial determination has already been made. To be sure, these considerations argue equally against hearing the claims at all long after the facts took place. But Congress, by making habeas corpus available, has determined that other considerations prevail. We are left to devise appropriate rules, and the congressional determination does not preclude *rules recognizing the soundness of giving great weight to testimony earlier heard*, just as it does not undermine the principle that the burden of proving facts inconsistent with judicial records in all proceedings of this kind is heavy [emphasis added].

See also *Thomas* v. *Arizona*, 356 U.S. 390, 403, and the discussion of the necessity of relying on the state record in the recent decision in *Rogers* v. *Richmond*, 365 U.S. 534, 547–549, where the Court held that, when the state court had applied an improper standard in determining the admissibility of a confession, the question of whether the confession was in fact coerced could not be determined *de novo* in the habeas corpus action. The opinion noted that it would not be fair to the prisoner or the state to have voluntariness determined "in abstraction from the whole, living complex of a criminal trial." 365 U.S. at p. 548.

3. The practical considerations which this Court discussed in *Brown* v. *Allen* and *Rogers* v. *Richmond* as to why a determination of the issue of the admissibility of the confession should normally be based on the trial record apply with equal, if not greater, force to federal proceedings.

(*a*) Since the enactment of 28 U.S.C. 753, providing for the recording of all proceedings in federal criminal cases, it would be a rare case in a federal court where the record was not already in existence or readily available. As to federal trials, there is no longer any real danger (which exists in some state cases) that an adequate transcript of the trial record will not be available to present the issues. And it is important in federal criminal law, as in state, that the admissibility of a confession be determined in the "living complex of a criminal trial." The dangers inherent in the lapse of time, and partial presentations, apply equally to federal as to state prisoners.

This very case indicates how the fact of conviction and the lapse of time can result in deliberate or unconscious embellishment of facts. Petitioner's motion under 28 U.S.C. 2255 made allegations of fact going beyond those to which petitioner himself testified at the trial. Petitioner alleged in his motion that, while held by the Chicago police, he was questioned continuously, beaten physically, and subjected to psychological as well as physical torture, with the result that he made a statement demanded by the Chicago police but refused to sign it (R. 2). His own testimony at the trial concerning the "continuous" questioning—assuming that it was believed by either the court or jury—cited four questionings by Chicago police, none exceeding 30 or 45 minutes. His testimony before the judge adduced three appearances in lineups, one during the night (in the testimony before the jury, four lineups, two at night), none of the lineups involving unduly bright lights or any questioning. As to physical beatings, petitioner had testified before the trial judge that the Chicago police "[r]oughed me up a little bit" (R. 72), but he presented no such testimony before the jury. And, in contrast with the allegation in his motion under Section 2255 that he made a statement to the Chicago police which he refused to sign, his testimony at the trial was that he at no time admitted the robbery to the Chicago police (R. 71, 79). Petitioner also alleged in his motion that when the Washington police arrived in Chicago to take him back to Washington they "demanded a confession from defendant under threat of

handing him back over to the Chicago police for further mistreatment and abuse. Whereupon, defendant signed an alleged confession, waived extradition and was returned * * *" (R. 2). This statement ignores petitioner's own testimony at the trial that he had waived extradition *a day before* the alleged threat—and before the Washington police arrived in Chicago—in a formal hearing before the Chief Justice of the Municipal Court. The statement also ignores the whole impact of petitioner's testimony at the trial that he had at no time made any statement to the Chicago police and that, in point of time, his confession to the Washington police had occurred *after* those officers showed him his brother's and Stramer's confessions (R. 73).

This case is thus an illustration of the need for "rules recognizing the soundness of giving great weight to testimony earlier heard" (opinion of Justice Frankfurter in *Brown* v. *Allen*, 344 U.S. at p. 506). Considering how fully the disputed issues were canvassed at the trial, there would be no occasion for a new evidentiary hearing to resolve, separately from and subsequent to the trial, disputed issues of fact as to the circumstances of the confession.

(*b*) In addition, there is a special reason why a new evidentiary hearing on the voluntariness of a confession should not be held under 28 U.S.C. 2255 with respect to federal criminal convictions—whatever the procedure may be in federal habeas corpus proceedings attacking state convictions. The critical difference is that in a federal criminal trial federal consti-

tutional issues are decided in the first instance by a federal court, and the ruling is subject to direct review within the federal system. In state cases the initial rulings under the federal constitution are by state courts, and (except for federal habeas corpus) review by a federal tribunal can be had only in this Court on certiorari or appeal. As shown by the federal habeas corpus statute itself (28 U.S.C. 2241(3)) as well as by the successive statutes on the jurisdiction of this Court over state cases, there has for many decades been a strong feeling that final resolution of federal constitutional rights in criminal matters should not be left to the state courts—which may not apply the same constitutional rules as those established by this Court and the lower federal courts. At the same time, the Court has recognized that its direct appellate jurisdiction over state criminal cases cannot by itself—in view of the heavy burden the Court bears—adequately vindicate constitutional rights in state cases. See *Brown* v. *Allen*, 344 U.S. 443, 491–497; *Darr* v. *Burford*, 339 U.S. 200. The habeas corpus remedy of 28 U.S.C. 2241 is needed so that federal tribunals can consider and decide such constitutional claims.

But with respect to federal criminal trials the function of deciding these constitutional issues is initially placed in a federal tribunal; if a conviction is had, there is review as of right by an intermediate federal tribunal, the court of appeals; and if the case comes here on a petition for certiorari, there is greater opportunity for consideration by this Court of a constitutional claim than in the state cases (especially in

view of the greater number of state criminal cases). The coordinated steps of direct review within the federal system are more likely to expose and evaluate a substantial constitutional claim. See also *infra*, pp. 49–52.

C. *Since petitioner's motion under Section 2255, drawn by counsel, was not based on the trial record and since that record clearly shows that there was evidence of voluntariness to go to the jury, this case may be disposed of on the ground that on its face the motion does not state a cause of action.*

Under the principles we have discussed (*supra*, pp. 27–43), we think this case can be disposed of on the simple ground that petitioner's motion under 28 U.S.C. 2255 fails, on its face, to state a claim on which relief may be granted, or, to put it another way, that "the files and records of the case conclusively show that the prisoner is entitled to no relief" (*supra*, p. 3). The motion, drawn not by a layman, but by counsel, is plainly deficient. Petitioner has not relied on the trial record but has attempted to allege new facts; he has not alleged that the undisputed evidence at his trial showed coercion; and he has not asserted that there was no evidence from which a judge or jury could find voluntariness.

Moreover, the trial record demonstrates that in fact such allegations could not properly be made.[10] The trial testimony set forth in the Statement, *supra*, pp. 4–9, does not show coercion even on petitioner's own

[10] Petitioner's motion under Section 2255 in effect incorporates the trial record (R. 3).

testimony. While he said before the judge that the Chicago police "roughed" him up a bit, he did not even repeat that allegation before the jury. According to his own testimony at the trial, he was not continuously questioned but was questioned four times, at no time exceeding 30 to 45 minutes, and he made three or four appearances at a lineup where he was not questioned. While he was held in Chicago from the time of arrest on April 29 until the Washington police arrived and were able to make reservations to return on May 3, he was taken on May 1 before the Chief Justice of the Municipal Court where he voluntarily waived extradition and, pending arrival of Washington police, was placed in the custody of the Sheriff of Cook County.[11] He made no statement to the Chicago police. His confession to the Washington police was made only after he was confronted with the statements of his companions. He was admittedly well treated by the Washington police and he repeated his confession in Washington in front of the victim of the robbery. Thus, on petitioner's own testimony, the court and jury could reasonably find that the confession was the result, not of coercion, but of petitioner's knowledge that his companions had told the true story. Cf. *Stein* v. *New York,* 346 U.S. 156, 186. When to petitioner's own testimony there is added the testimony of the Washington officers cate-

[11] Obviously a suspect in an armed holdup case, apprehended with a revolver and ammunition for a second revolver in his possession, could not be left to roam the streets while awaiting the arrival of police from another city to take him back. Petitioner made no move for release on bail, as he was willing to await return to Washington.

gorically denying any threat to petitioner and the testimony of the Chicago arresting officer that the arrest was peaceably made and that from the start petitioner agreed to return to Washington, it is clear that the trial judge committed no error in permitting the issue of voluntariness to go the jury.

That is as far as we think this Court needs to go in this case. However, since the general issues which petitioner raises—whether a claim of coercion is normally cognizable under 28 U.S.C. 2255, or whether the specific allegations as to lack of information as to the right to appeal make it so cognizable—are encompassed by the grant of certiorari, we set forth our views on those more general points.

II

ABSENT SOME SHOWING OF SPECIAL CIRCUMSTANCES, THE DECISION OF A FEDERAL COURT THAT A CONFESSION MAY BE ADMITTED INTO EVIDENCE IS REVIEWABLE ONLY ON APPEAL AND NOT BY MOTION UNDER 28 U.S.C. 2255

The logic of petitioner's argument, in its broader aspect, seems to be that, even if he had appealed his conviction and the admissibility of the confession had been sustained on appeal, he could still by motion under 28 U.S.C. 2255 attack the admission of his confession and obtain a new evidentiary hearing. There is little to support this position. *First*, the general scope of relief under Section 2255 from a conviction based on an allegedly coerced confession, if relief is available at all, would necessarily be narrower than petitioner recognizes. As we have shown in Point I,

supra, where no claim is or can be made that there was any defect in the trial procedure, the question of the cognizability under Section 2255 of a claim of the use of a coerced confession is merely this: whether, on motion under 28 U.S.C. 2255, the district court should reconsider its previous ruling of law that on the trial record there was sufficient evidence of voluntariness to permit the confession to be received in evidence and the issue to go to the jury. *Second,* although this Court has held that such an issue of law may be reviewed as to state convictions by a federal habeas corpus action (which necessarily lies in a court different from that of the trial), the very considerations which support collateral review of state judgments in that situation militate against permitting such review by federal courts of federal judgments (in the absence of a showing of extraordinary circumstances). Since, as to federal judgments, the same principles are applied by the same courts, both at the trial and on appeal (on the one hand) and on motion under 28 U.S.C. 2255 (on the other), to permit the admission of the confession to be reviewed by motion under 28 U.S.C. 2255 would in effect be to permit a long delayed petition for rehearing or to permit Section 2255 to be used as a substitute for appeal.

A. *There is no reason why a federal trial court acting under Section 2255 should review the ruling on admissibility made by the federal trial court at the trial.*

1. We have shown in Point I, *supra,* pp. 27 *ff,* that even if a collateral challenge to the admission of a confession were allowable, the Section 2255 court

would consider the issue on the basis of the undisputed and undisputable parts of the trial record and would not order a new contest of the facts (except, perhaps, where the prior hearing on the issue had not been procedurally fair or newly discovered evidence was proffered). The question remains whether, even on this limited basis, collateral attack should be permitted in federal criminal cases, as petitioner claims, whether or not an appeal from the conviction was prosecuted.

2. It is now established by the decisions of this Court that, as to *state* convictions, collateral attack by way of habeas corpus in the federal courts is available to consider whether the use by a state of a coerced confession violated due process. *Reck* v. *Pate*, 367 U.S. 433; *Rogers* v. *Richmond*, 365 U.S. 534; *Irvin* v. *Dowd*, 359 U.S. 394; *Thomas* v. *Arizona*, 356 U.S. 390; *Leyra* v. *Denno*, 347 U.S. 556; *Brown* v. *Allen*, 344 U.S. 443. The specific holding of these cases is that the federal court (normally on the basis of the trial record) must make its own determination as to whether, on the undisputed facts, there was a showing of coercion or there was no evidence to support a finding of voluntariness.

We do not believe that the transition is as easy as petitioner seems to think from these rulings with respect to state convictions to the conclusion that federal courts must also reexamine—by the federal substitute for habeas corpus, a motion under 28 U.S.C. 2255—the use of a confession at a federal trial, even in the limited degree to which that review relates in state cases, *i.e.*, whether on the undisputed facts it

was error to permit the confession to be admitted in evidence.

The claim of coercion (as distinguished from undue delay in arraignment) has been in recent years so rare in federal courts that this Court has not heretofore had occasion to pass on the question. The one older decision of the Court on habeas corpus that can be said to have any direct bearing on the issue is contrary to petitioner's position that all constitutional issues are open under Section 2255. In *Matter of Moran*, 203 U.S. 96, 105, this Court held that a complaint that the petitioner was compelled to be a witness against himself by being forced to stand up and walk before the jury—a constitutional claim—was not an issue cognizable on habeas corpus, saying—

> If this was an error, as to which we express no opinion, it did not go to the jurisdiction of the Court.

Certainly, the lower federal courts have not been of the view that the rulings with respect to habeas corpus review of state convictions necessarily extend to collateral attack on federal convictions, either by habeas corpus or by motion under 28 U.S.C. 2255. They have consistently held that the claim that a coerced confession was used is not an issue which is cognizable collaterally.[12]

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[12] *Smith* v. *United States*, 187 F. 2d 192, 194 (C.A. D.C.), certiorari denied, 341 U.S. 927 (in which "coercion and duress" was alleged, not merely unlawful detention); *Eury* v. *Huff*, 146 F. 2d 17 (C.A. D.C.) ("subjected to constant physical and mental pain"); *Cash* v. *Huff*, 142 F. 2d 60 (C.A. 4), certiorari denied, 323 U.S. 747 (confession "extorted"); *Mil-*

As we have indicated in Point I, *supra*, pp. 41–43, the important considerations supporting review on federal habeas corpus of the use of confessions by state courts do not apply to federal judgments. It has long been established that the use of such a confession is a violation of a right protected by the United States Constitution. And while, of course, state courts are governed by the Constitution, experience has shown that, in interpreting the constitutional right, state courts do not always apply the same standards as the federal courts. On direct review of a state conviction, the only federal court which can pass on the constitutional question is this Court. The difficulties which this Court encounters in passing on such questions on petitions for writs of certiorari to review decisions of the highest court

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ler v. *Hiatt*, 141 F. 2d 690, 691 (C.A. 3), ("threats and intimidation"); *Burall* v. *Johnson*, 134 F. 2d 614 (C.A. 9) ("duress, threats, and promises"); *Yodock* v. *United States*, 97 F. Supp. 307, 310–311 (M.D. Pa.) ("questioned day and night", officer "invented a phony confession"); *United States* v. *Kranz*, 86 F. Supp. 776, 777 (D. N.J.) ("coerced confession"). And see *Davilman* v. *United States*, 180 F. 2d 284, 286 (C.A. 6), and *Stegall* v. *United States*, 153 F. Supp. 844, 847 (W.D. Ky.), affirmed, 259 F. 2d 83 (C.A. 6), certiorari denied, 358 U.S. 886 (involving admission of confession of a co-defendant); *United States* v. *Edwards*, 152 F. Supp. 179 (D. D.C.), affirmed, 256 F. 2d 707 (C.A. D.C.), certiorari denied, 358 U.S. 847; *United States* v. *Lowrey*, 84 F. Supp. 804, 807 (W.D. Pa.), affirmed, 179 F. 2d 964 (C.A. 3), certiorari denied, 339 U.S. 969.

Petitioner argues that a number of these cases did not charge coercion, but illegal detention under the *McNabb-Mallory* rule (Pet. Br. 23, fn. 14). But, as appears from the quotations we give in the preceding part of this footnote, there were allegations of coercion in addition to possible claims of mere illegal detention.

of a state have been described in *Brown* v. *Allen*, 344 U.S. at pp. 489–502. If a denial of certiorari by this Court concluded all issues with respect to the admission of the confession, there would, in many cases, be no substantial federal review. Such a result, this Court indicated in *Brown* v. *Allen*, would be inconsistent with the Congressional intent manifested since 1867 when federal courts were authorized to issue a writ of habeas corpus to prisoners in state custody in violation of the Constitution of the United States.

The situation with respect to the use of a confession at federal trials is quite different. The same standards of interpretation of the constitutionally-protected right govern the action of all federal district courts and all federal courts of appeals. That federal standard is directly applied at the trial and on direct review. That same standard necessarily would be applied if the issue were deemed cognizable on collateral attack, either by habeas corpus or 28 U.S.C. 2255. Hence, in the case where the admissibility of the confession is determined by the trial court and reviewed on direct appeal, reconsideration of the issue would often be, in effect, a delayed reconsideration of a prior decision. When habeas corpus was the remedy, it would require a district court to reconsider an issue already determined by a court of appeals in the same or another circuit and the court of appeals (on appeal in the habeas corpus proceeding) to review an issue which conceivably might even have been decided by this Court. Under the present procedure by motion under 28 U.S.C. 2255, the very same district court

and the very same court of appeals would be required (on the same record) to reconsider their prior decisions, again whether or not reviewed by this Court. Except perhaps in the situation where there has been a change in the applicable law—and there has been none as to the principles governing coerced confessions—it is difficult to conceive how a general opening of this issue to review on 28 U.S.C. 2255 could serve any real purpose other than to increase the already large number of frivolous motions under 28 U.S.C. 2255.

Since this petitioner claims that his right to appeal was frustrated (an issue we discuss *infra*), the problem of this particular case may be different. But the repetitious and useless litigation that could ensue indicates, we think, the invalidity of the categorical assumption which petitioner makes (on the basis of cases involving state convictions) that "a criminal conviction is subject to collateral attack if the conviction was based an a coerced confession (Pet. Br. 12)." To the contrary, it seems to us that the very reason which supports review by habeas corpus of state convictions—the necessity of having a procedure whereby a federal court will apply federal interpretation of the constitutional standard to state trials—shows that there is no necessity for such review as to federal criminal convictions. We think this Court so recognized in *Sunal* v. *Large*, 332 U.S. 174, 178, when it said:

> We put to one side comparable problems respecting the use of *habeas corpus* in the federal courts to challenge convictions obtained

in the state courts. See *New York* v. *Eno*, 155 U.S. 89; *Tinsley* v. *Anderson*, 171 U.S. 101, 104–105; *United States ex rel. Kennedy* v. *Tyler*, 269 U.S. 13; *Ex parte Hawk*, 321 U.S. 114, 116–117. So far as convictions obtained in the federal courts are concerned, the general rule is that the writ of habeas corpus will not be allowed to do service for an appeal.

B. *Disputed rulings of law like the admissibility of a confession must normally be reviewed on direct appeal and not by habeas corpus or its statutory substitute.*

An issue such as the admission of an allegedly coerced confession should normally be tested on direct appeal and not collaterally under Section 2255. We have discussed (*supra*, pp. 35–37) the authorities which hold that a court will not, on collateral attack by motion under 28 U.S.C. 2255 or habeas corpus, normally re-examine issues of fact which were considered and resolved at the trial. The same principle has been applied, although less absolutely and less clearly, to issues of law, and we believe that it should govern the question of admissibility.

We recognize that there are some issues which are deemed so directly at the heart of jurisdiction that they are reviewable on motion under 28 U.S.C. 2255 even though they have or could have been raised at the trial and have or could have been raised on appeal. See *Bowen* v. *Johnston*, 306 U.S. 19, 27; *Sunal* v. *Large*, 332 U.S. 174, 178. This we think is the explanation of *Jordan* v. *United States*, 352 U.S. 904,

upon which petitioner so heavily relies (Pet. Br. 10, 16–18). The lack of a speedy trial (a nine year delay between indictment and trial) could be deemed to vitiate the entire trial and in that sense was truly jurisdictional.

But with respect to other so-called jurisdictional or constitutional claims this Court pointed out in *Sunal*, 332 U.S. at p. 179:

> Thus where the jurisdiction of the federal court which tried the case is challenged or where the constitutionality of the federal statute under which conviction was had is attacked, *habeas corpus* is increasingly denied in case an appellate procedure was available for correction of the error. * * *

And again in *Bowen* v. *Johnston*, 306 U.S. at pp. 26–27, the Court suggested that even as to jurisdictional issues "[t]he rule requiring resort to appellate procedure" has "special application" not only where there are issues of fact, but also "to the determination in ordinary cases of disputed matters of law".

We think that the admissibility of an allegedly coerced confession presents such a "disputed matter of law". Even if it be said that the admission of a confession at the trial is a matter which goes to jurisdiction in the expanding sense in which the term is now often used, it does not follow that the issue can be raised collaterally rather than by direct appeal. This is not an issue going to the heart of the authority of the district court to try the criminal case at all. Rather it is an evidentiary problem normally turning

on the particular facts, especially as they are viewed in the context of the entire trial. Just as the issue of whether a court does or does not have jurisdiction over a crime may involve resolution of conflicting facts and disputed issues of law, the question of whether or not a constitutional right has or has not been violated by admission of a confession involves similar considerations. While the standard as to a coerced confession is clear enough, the issue of admissibility which we have called an issue of law, involving the application of that standard to particular facts, is often far from simple, even on undisputed facts. Arising as it does in the complex of a criminal trial, it is peculiarly the type of question of law which, even if deemed jurisdictional, should under the decisions of this Court be normally held reviewable only on appeal from the conviction and not by a motion under 28 U.S.C. 2255.

Petitioner relies upon the language in the *Sunal* opinion that the writ of habeas corpus has been held available "where the trial or sentence by a federal court violated specific constitutional guarantees" (Pet. Br. 15); and Section 2255 refers to a sentence "imposed in violation of the Constitution" (*supra*, p. 2). But it is plainly not enough to bring Section 2255 into operation merely to allege the transgression of a constitutional right. A conviction based on wholly insubstantial evidence can be characterized as a denial of due process (see *Thompson* v. *Louisville*, 362 U.S. 199), but surely a Section 2255 court cannot be asked

to review the sufficiency of the evidence to support a federal conviction. See *Harlan* v. *McGourin*, 218 U.S. 442 (discussed *supra*, p. 35). Many other types of serious errors in criminal cases can be phrased in constitutional terms. In *Sunal*, where the defendant was not allowed to put in a defense which under later decisions of this Court might have defeated conviction, the claim of error could have been, and in fact was, couched in terms of a denial of the constitutional right to defend oneself. Moreover, Section 2255 also refers to a sentence imposed in violation of the "laws of United States", but it could hardly be maintained that every trial error contravening a federal statute or rule of criminal or civil procedure is cognizable under Section 2255.

The significant factor is, not the characterization of the claim as founded on the Constitution or laws, but the kind of issue actually involved. Sufficiency of the evidence is for the appellate courts alone, no matter what label the claimed error is given. The same is true, we submit, of the admissibility of a confession. For the reasons we have given above, that is the kind of question which should normally be scrutinized only on direct appeal and not by collateral attack.

The opinions in *Sunal* v. *Large* and *Bowen* v. *Johnston* caution against any attempt to formulate rigid principles with respect to the scope of review by habeas corpus (now by motion under 28 U.S.C. 2255). We do not attempt to do so. We do not

suggest that never, under any conceivable set of circumstances, may the admission of a federal confession at a federal criminal trial be the subject of review under 28 U.S.C. 2255. We do urge, however, that it should take a considerable showing of special circumstances to permit the question to be open for reconsideration collaterally. Not only is a federal defendant surrounded with the safeguards stemming from the absolute right to counsel (unless waived), but recent decisions of this Court (*e.g.*, *Johnson* v. *United States*, 352 U.S. 565) have extended to the most indigent of defendants the possibility of direct review. Under these circumstances, it would not be in the interest of justice to extend the normal scope of collateral review to such matters, which not only could have been but actually were in issue at the trial. The defendant has been accorded a fair opportunity to present his claim, and there is no need for further repetitious litigation delaying the final termination of the criminal case.

The question of whether, in the particular circumstances alleged by petitioner, the failure to appeal in this case is the type of special situation which would justify the reconsideration of the issue of the admissibility under 28 U.S.C. 2255 is a separate problem which we discuss *infra*, p. 57 *ff*. Our point here is that, in the normal situation, where the admissibility of the confession has been raised and determined at the trial, the decision as to admissibility should not be reconsidered under 28 U.S.C. 2255.

III

PETITIONER'S SHOWING AS TO HIS REASONS FOR FAILING TO APPEAL DO NOT JUSTIFY CONSIDERATION OF THE ISSUE OF ADMISSIBILITY ON COLLATERAL ATTACK AND IN ANY EVENT DO NOT JUSTIFY A NEW HEARING ON THE FACTS

A. *Petitioner's factual showing as to his reason for failing to appeal does not justify the use of collateral review in place of direct review.*

As we have noted, special circumstances may sometimes justify resort to collateral attack to achieve fundamental justice even though the issue raised is not one normally cognizable in collateral proceedings. We can conceive of cases where the failure to appeal can be the kind of special circumstance justifying reconsideration of the admissibility of a confession under 28 U.S.C. 2255 in order that a defendant may have the appellate review of that issue of which his failure to appeal deprived him. Unquestionably that would be true if the failure to appeal were due to some misconduct by the government. Relief may also be available, even where the government is not at fault, under other circumstances such as misinformation by the court or court attaches. It is petitioner's claim that he has made such a showing of ignorance of his right to appeal that his case should be deemed to fall in that category. We do not agree.

1. The issue comes before this Court in an unsatisfactory manner. Petitioner's original motion under 28 U.S.C. 2255, filed by counsel on August 20, 1957, did not include any allegation of lack of knowledge of

the time limit for appeal (R. 1–3). Despite the government's opposition pointing out that the motion stated no basis for collateral challenge, at the hearing (on October 25, 1957) petitioner's attorney apparently did not raise the present excuse, for neither the judge's findings of fact nor his conclusions of law adverted to any such claim of ignorance of the right to review. The affidavits presenting the claim of lack of knowledge (R. 12–16) were not filed until 1959 in the Court of Appeals. Since orderly procedure requires that contentions not raised in the trial court should not normally be considered upon appeal,[13] the court of appeals would have been justified in declining to accept, at the appellate level, a new ground for relief neither alleged nor tried below. However, since the issue was considered by the court below *en banc,* on the basis of the belated affidavits, the question is here to the extent that it is necessary to consider whether petitioner has made a sufficient showing to justify a hearing to determine whether his reasons for failure to appeal would justify reconsideration of the admission of the confession by motion under 28 U.S.C. 2255.

2. In judging the sufficiency of the allegations as to the reasons for petitioner's failure to appeal, there are certain background facts that should be noted. One is the time at which the claim of lack of knowledge was advanced—not immediately after the appeal period had elapsed, but over two years later, after a

[13] *Plummer* v. *United States*, 260 F. 2d 729, 730 (C.A.D.C.); *Walker* v. *United States*, 218 F. 2d 80, 81 (C.A. 7); *Way* v. *United States*, 276 F. 2d 912 (C.A. 10).

motion under 28 U.S.C. 2255 had been denied and appealed. Another is the fact that, long before petitioner went to trial, he had pleaded guilty, and in the subsequent interval between August 30, 1956, the date of that plea, and February 7, 1957, he produced two *pro se* proceedings for the setting aside of his sentence; he was not entirely ignorant of criminal procedure or of his rights. Moreover, while the affidavits alleged that petitioner was taken out of the courtroom immediately after sentence on May 3, 1957, the verdict of guilty was rendered 18 days before, on April 15, 1957.

In the light of these facts the present affidavits are too cautiously worded to carry the conviction that failure to appeal was really the result of petitioner's ignorance. Neither petitioner nor his trial attorneys asserted in their affidavits that petitioner did not know of the right to appeal. Petitioner's affidavit stated only that he did not "recall" having any conversation concerning the taking of an appeal with the two, named, attorneys who represented him at the trial, and it is clear that, particularly during the interval between the verdict and the sentencing, petitioner could have learned of his right to appeal from a number of sources. Nor was it alleged in the affidavits that petitioner did not know that a time limit existed. All that was alleged was that he did not know the exact length of that time limit.

In addition, petitioner's trial attorneys stated in their affidavit that they had recommended an appeal to his wife after petitioner left the courtroom and that she had indicated that she would "discuss it

with her husband" and would suggest that he request court appointment of counsel. No affidavit of the wife was presented and petitioner stated that he no longer knew her address or occupation (R. 15, 16).[14] The affidavit of the attorneys shows that petitioner's wife was the proper representative of petitioner with whom to discuss the appeal, for it was she who had requested the attorneys to defend petitioner. At most, petitioner's allegations amount to the statement that the person to whom petitioner had entrusted the obtaining of trial counsel—his wife—had failed to inform him of the requirement that he obtain new counsel for an appeal. There was thus, at most, only "neglect" to take an appeal—neglect, neither by the government nor by petitioner's counsel, but by petitioner's wife acting for petitioner.

We submit that the law cannot lightly absolve persons from responsibility for such neglect. It is true that laymen must place reliance upon others in court proceedings, but the law cannot safely encourage irresponsibility by according an absolution to neglect of this type. Petitioner allowed his wife to conduct the dealings with counsel, at least with respect to obtaining appellate counsel. On his own version of the events, there is no showing that he did anything about following up the trial proceedings, or that he made any inquiry. As was stated by this Court in the much more severe case of *Felts* v. *Murphy*, 201 U.S. 123, 130 (where the defendant failed to object

[14] Petitioner is apparently now aware of his wife's address. See Pet. Br. 9, fn. 5.

at the trial with reference to his inability to hear), petitioner "made no objection, asked for nothing, and permitted his counsel to take his own course. We see no loss of jurisdiction in all this and no absence of due process of law".

The court of appeals, in determining whether a remand should be had, was confronted with affidavits that were patently inadequate even though they had manifestly been prepared by new appellate counsel for petitioner and could be expected to state the most favorable version of what could be proved on remand. The court was thus well justified in its conclusion that no further inquiry was warranted. If on the basis of the showing here a hearing were required, every convicted defendant who did not appeal could subject the courts at a later time to the necessity of a hearing on the issue of what the defendant's attorneys or emissaries told him and what instructions the defendant gave his attorneys or emissaries. See, *e.g.*, *Lewis and Simms* v. *United States*, C.A.D.C., pending on petition for writ of certiorari, No. 243 Misc., this Term, where one defendant's counsel had discussed appeal with him and the other defendant's counsel had concluded that there was no basis for successful appeal. We think something more must be shown than was shown here. Intentional betrayal by counsel or total abandonment of representation need not be countenanced, but the ordinary human frailties and errors of the defendant's representative must be the responsibility of the principal who chooses his agents.

B. *Since the trial record clearly shows that petitioner is not entitled to relief, there is in any event no occasion for a hearing on the reasons for petitioner's failure to appeal.*

Moreover, regardless of the considerations discussed immediately above, for the reasons given in Point I, *supra*, pp. 27–45, there is no occasion for a further hearing in this case. Whether review be by appeal or by collateral attack, the only question for review is whether, on the basis of the undisputed facts in the trial record, there was coercion or whether there was an absence of evidence from which a judge or jury could find voluntariness. In other words, the issue is whether the judge erred in submitting the issue of voluntariness to the jury. Since, on the trial record, it is so clear that the issue of voluntariness was at the most one for resolution on conflicting testimony, no purpose would be served by a remand.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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OCTOBER 1961.

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No. 58

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

JOHN E. HODGES, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I.

The Introduction and Point I of the Government's brief —extending to page 45—have little, if anything, to do with the issue before the Court in this case. This voluminous material apparently represents an attempt to get the Court to consider and dispose of this case on an issue which the Government must feel is easier for it, but which was not decided by the Court of Appeals, is not before the Court

in the present posture of this case, and was not presented by the petition for certiorari. The Government contends:

> . . . [W]e think this case can be disposed of on the simple ground that the files and records conclusively show that this prisoner is entitled to no relief even if the question of coercion is normally cognizable under Section 2255. [Govt. Br. 18-19.]
>
> . . . [I]t is indisputable that there were controverted factual issues [on the question of coercion] which should properly be sent to the jury and that the trial judge was plainly correct in admitting the confessions and then submitting the question of voluntariness to the jury. Accordingly, the present case can be disposed of on the limited ground that the records and files conclusively prove that petitioner has no cause of action under 28 U.S.C. 2255. [Govt. Br. 25]

In an attempt to entice the Court into a consideration of this question, rather than the question decided by the Court of Appeals and presented by the petition for certiorari, the Government argues two interesting legal questions (not now involved in this case) as the predicate for its argument that on the merits petitioner is not entitled to relief. These are as follows:

1. What should be the scope of review in a 2255 proceeding: Should the 2255 court consider the question of coercion de novo, or should it decide only whether there was error in submitting the question of coercion *vel non* to the jury?

2. What evidence of coercion should the 2255 court consider: Only the trial transcript or additional testimony as well?

With regard to the first question, the Government argues at length that the scope of review on collateral attack should be no broader than that available on direct appeal; that is, the question should be, not whether the confession

was coerced, but whether the trial judge erred in submitting the question to the jury.[1]

With regard to the second question, the Government argues that a 2255 proceeding should be heard on the trial transcript alone without new evidence or testimony (absent exceptional circumstances).[2]

If it is correct on both these points, then, the Government argues, it is clear that on the merits of this case the prisoner is not entitled to relief because the trial court committed no error at the trial. We emphatically disagree with this conclusion.

But the point we wish to stress here is that none of these questions is presented to the Court in the present posture of this case. The Court of Appeals held only that a federal conviction based on a coerced confession could not be

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[1] While this would appear to be correct, the scope of review on collateral attack would be broader if the scope of review on direct appeal were concomitantly broader. The scope of review on direct appeal would, of course, be broader if this Court should find that the appropriate procedure in federal courts in determining the admissibility of an allegedly coerced confession should be that the trial judge himself determines the question of coercion *vel non* before submitting it to the jury for their determination, instead of the current practice in which the court decides only whether or not there is sufficient evidence for a jury to find that the confession was voluntary.

[2] At this point in this case, it is, of course, an entirely moot question as to whether new evidence should be heard because this case was heard in the Court of Appeals on the basis of the trial transcript alone. There can, therefore, be no possibility of the Court of Appeals' having erred in considering new evidence.

Of course, there was new evidence with regard to the circumstances surrounding petitioner's failure to take a direct appeal, but this was made necessary by the loss of the reporters notes of the 2255 hearing in the district court (See Pet. Br. 6, fn. 3). This new evidence has nothing to do with whether or not the confession introduced at the criminal trial was in fact coerced. We discuss the Government's attack on the lateness of this evidence surrounding petitioner's failure to take a direct appeal, *infra*, at pp. 7-8.

attacked collaterally in the absence of a direct appeal. It did not consider what evidence a district court should consider in a 2255 proceeding *if* collateral attack were permitted on this ground. It did not consider what the scope of review should be *if* collateral attack were permitted on this ground. The Court of Appeals ruled only that a collateral attack on the basis of a coerced confession was not cognizable under Section 2255. In so doing, the Court specifically assumed that the confession had been coerced. It was therefore irrelevant whether the claim should be heard on the trial record or on the basis of a new hearing; or whether the question should be (1) whether the confession was coerced or (2) only whether the district court erred in submitting the question of coercion to the jury. The Court of Appeals simply held that under no circumstances short of Government obstruction of an appeal would collateral attack be permitted under Section 2255 on the basis of the admission of the coerced confession. The only question presented by the petition for certiorari was whether this narrow ruling of the Court of Appeals was correct. The only question argued in petitioner's brief on the merits is this narrow question.

There will be time enough to argue the interesting questions which the Government raises in its Introduction and Point I if they arise after this case has been remanded to the Court of Appeals and from there to the district court. Then we may consider what should be the scope of review by the district court and the evidence on which its decision should be made, as well as whether petitioner has a claim on the merits. But these questions are not present in the current posture of the case before this Court. The only question now before the Court is whether a claim of coerced confession may be made under Section 2255 in the absence of a direct appeal.

II.

We would also like to take exception to the implication in the Government's brief that a *little* coercion is all right

—as long as it is not too much. Throughout its brief the Government recognizes that a federal conviction based on a coerced confession may be collaterally attacked if it is *really* coerced: "We are willing to assume with petitioner that a conviction based on an admittedly coerced confession may be voided whenever that fact clearly appears" (Govt. Br. 24; see also Govt. Br. 56). The Government appears to be arguing that a federal conviction based on a coerced confession may be collaterally attacked whenever the Government admits that the confession was coerced. Presumably, it would do so upon clear evidence that the rack and thumb screws were applied. If, however, the case is closer—or arguable on both sides—then the defendant may not obtain a ruling on the question of coercion or on the correctness of the submission of this issue to the jury. Thus, the Government seems to contend that, where the question of coercion is arguable, collateral attack should not be permitted in order to resolve the question. Only where the question is clear beyond argument should collateral attack be permitted.

This approach simply does not make sense. There is no such thing as "a little coercion." A confession is either coerced or it is not. A confession is no less coerced because the Government is able to make an argument to the contrary. Certainly the Government's argument to the contrary is not controlling and is no substitute for a judicial determination. In none of the landmark cases in this Court dealing with coerced confessions has the prisoner's attack gone unopposed. To argue as the Government does that a ruling on the question of coercion *vel non* should be denied simply because the question is arguable, is the worst sort of question begging. It should be squarely rejected by this Court. And all the petitioner asks here is that his claim be heard, and determined, not by the Government, but by the courts.

III.

When it comes to meeting the question presented by the petition for certiorari, the only reason the Government is

able to find as to why collateral attack should not be allowed to correct a federal conviction based on a coerced confession is that such an attack would require a district court to rehear the question of coercion.

It is true that permitting collateral attack would require a district court to rehear this question. But is it not a small price to pay in order to give a prisoner an appellate ruling on so basic a claim—one which, if true, is so abhorrent to all western and civilized jurisprudence? In many instances where the Government admits collateral attack should be permitted, the district court is required to hear on collateral attack questions which it has previously decided. The Government confesses that:

> . . . We can conceive of cases where the failure to appeal can be the kind of special circumstance justifying reconsideration of the admissibility of a confession under 28 U.S.C. 2255 in order that a defendant may have the appellate review of that issue of which his failure to appeal deprived him. Unquestionably that would be true if the failure to appeal were due to some misconduct by the government. Relief may also be available, even where the government is not at fault, under other circumstances such as misinformation by the court or court attaches. [Govt. Br. 57]

In the hypothetical cases in which the Government admits collateral attack would be available, as well as in other cases which could be imagined, the district court would be required to rehear a question that it had previously decided. If it is not so terrible in those cases, why is it so terrible here? In all of these cases, the district court is asked to reconsider a question in order that, if it adheres to its previous ruling, the question may be taken to a higher court.

This is not as burdensome on the courts as the Government seems to assume (Govt. Br. 51). It would not, as the Government argues, significantly increase the number of frivolous petitions. Even the Government recognizes

that the claim of coercion "has been in recent years so rare in federal courts" (Govt. Br. 48). Moreover, if a district judge chooses, he may easily deny the motion simply on the ground that he has ruled on the question previously. In this way the question could be quickly brought to the Court of Appeals. Finally, it should be noted that the courts have not been flooded with 2255 petitions resulting from rulings that coerced pleas of guilty may be collaterally attacked (See Pet. Br. 28).

IV.

The Government also argues that one of the reasons for permitting collateral attack of state convictions—namely, the need to provide a convenient federal forum for hearings on federal constitutional claims—is not present here where the prisoner's claim was initially heard in a federal court. This is true. But the Government erroneously concludes from this that the absence of this consideration should automatically result in a denial of the opportunity to attack the federal conviction collaterally. The fallacy of this logic is apparent. The question is not whether the same considerations are present in a 2255 case as are present in a 2254 case. The question is whether the competing policy considerations which *are* present in a 2255 case justify on balance this Court's permitting collateral attack. We submit for the reasons set forth in our main brief that they do.

V.

When the Government comes finally to consider the reasons surrounding this petitioner's failure to appeal, it condemns him for not explaining his failure to appeal until so late a date. Its basis for this argument is that petitioner did not present to the district court at his 2255 hearing the reasons surrounding his failure to appeal.[3] The factual basis for the Government's argument is pure conjecture.

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[3] Certainly there was no earlier opportunity—prior to his 2255 hearing—at which he could present these facts.

The reporter's notes for the 2255 hearing in the district court have been lost, as present counsel discovered when they were appointed by the Court of Appeals (See Pet. Br. 6, fn. 3). We therefore cannot be sure what transpired at this hearing. It is certainly probable that counsel proferred evidence as to the circumstances surrounding petitioner's failure to appeal. Moreover, as the Government concedes, the Court of Appeals considered the affidavits explaining the failure to take a direct appeal.

In its discussion of these affidavits of counsel and petitioner, the Government argues that they should not be believed:

> In the light of these facts the present affidavits are too cautiously worded to carry the conviction that failure to appeal was really the result of petitioner's ignorance. [Govt. Br. 59]

If the Government wishes to contest the truth of these affidavits, it would seem that the proper procedure would be, not for this Court simply to disregard them, but for a hearing to be held on the issue they affect. And a hearing is all that petitioner asks of this Court.

CONCLUSION

For the reasons stated in our main brief and for the additional reasons in this reply brief, it is respectfully submitted that the judgment below should be reversed.

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